SUPREME COURT OF [illegible]

OCTOBER TERM, [illegible]

No [illegible]

ROBERT McCORMICK, PLAINTIFF [illegible]

vs.

J. D. HAYES.

IN ERROR TO THE SUPREME COURT OF THE STATE [illegible]

[illegible]

(1 of 1)

(14,745.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No 230.

ROBERT McCORMICK, PLAINTIFF IN ERROR,

vs.

J. D. HAYES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

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a Pleas before the supreme court of Iowa in a cause therein tried and determined between J. D. Hayes, appellee, and Robert McCormick, appellant.

Be it remembered that on the 7th day of April, 1890, the appellant (now pl'ff in error) filed in the office of the clerk of said court a printed abstract of record, the same being in the words and figures following, to wit:

1 Supreme Court of Iowa.

J. D. HAYES, Appellee,
vs.
ROBERT MCCORMICK, Appellant. } Equity.

Appeal from the district court of Linn county—Hon. J. H. Preston, judge.

E. S. Bailey, N. D. Parkhurst, att'ys for appellant.
Davis & Voris, att'ys for appellee.

Appellant's Abstract.

This suit was commenced on the 17th day of September, 1888, and afterwards, at the June term, 1889, the plaintiff filed the following amended and substituted

Petition.

The plaintiff, for amended and substituted petition in the above-entitled action, says:

2 Par. 1. That he is the absolute and unqualified owner of the following-described real estate, situate in Linn county, State of Iowa, to wit:

The southwest ¼ of the northwest ¼ of section 19, township 85, range 8, west of the 5th P. M.

Par. 2. That he derived his title to said premises from Linn county, who derived it from the State of Iowa, who derived it from the United States under the swamp-land grant of the act of Congress of date 1850. An abstract of the title of said premises under which plaintiff claims title is hereto attached, marked "Exhibit A," and made a part hereof.

Par. 3. That said lands, or the greater part thereof, are swamp and overflow lands, and were at the date of the swamp-land grant of such lands to the State, and were covered and conveyed by said act of Congress of date 1850 to the State of Iowa, and by said State to Linn county by act of the legislature of said State of date February 2, 1853, being chapter 13 of the Acts of the Fourth General Assembly, and acts amendatory thereto.

Par. 4. That the defendant claims title to said premises adverse to the title of the plaintiff, but plaintiff avers and charges the truth

to be that the defendant has no title whatever to said premises or any part thereof; that such title claimed by defendant is derived wholly through the act of Congress of date May 15, 1856, and act amendatory thereto of date June 2, 1864, known as the railroad land grants, and all subsequent to the swamp-land grant to the State of Iowa as aforesaid.

Par. 5. That said lands lie a distance of more than 15 miles from the line of said railroad as surveyed and constructed, to wit, a distance of about 17 miles, and is not located along the "modified line" of said railroad as provided in section 4 of the act of Congress of date of June 2, 1864, which act was amendatory to the original act of May, 1856.

3 Par. 6. That said "modified line," along which defendant's grantors had a right to select lands within a distance of 20 miles on either side of said line, began at a point about 100 miles from Cedar Rapids, Iowa, thence extended west to the Missouri river.

Par. 7. That said lands were not included in or conveyed by the original grant of date 1856, or of any act amendatory thereto, and that defendant's alleged title to and claim upon said lands is a cloud upon plaintiff's title thereto.

Wherefore plaintiff demands judgment and decree establishing and confirming his title to said premises, and that the alleged claim of defendant to said land is of no validity whatever, and but a cloud upon plaintiff's title, and that said claim under and by virtue of said railroad land grant of 1856 and acts amendatory thereto is without right or warrant of law, and that said lands are in nowise affected by said grants or any of them, and for costs and general equitable relief.

DAVIS & VORIS,
Attorneys for Plaintiff.

The defendant filed the following

Answer.

The said defendant, for his answer to the amended and substituted petition herein—

1st. Denies that the plaintiff is the absolute owner of the tract of land described therein, or that he derived any title thereto in the manner stated in the second paragraph of said petition.

2nd. The defendant further denies that said land or the greater part thereof, at the date of the swamp-land grant, was swamp, or was overflowed land, or that it was covered, and conveyed by said act of Congress to the State of Iowa, or by the State to Linn county

4 by the legislature, as stated in the said petition, or that the same was ever certified, conveyed or patented by the United States to the State of Iowa, or by the State of Iowa to Linn county, or that the State of Iowa or Linn county, or any officer or agent of either selected, conveyed or patented said land as swamp under said act of Congress.

But defendant alleges that the State of Iowa accepted said tract

of land under the railroad grant, dated May 15, 1856 (as hereinafter stated), and proceeded to complete his title thereto under said latter grant, and that thereby both the State of Iowa and her grantors are concluded by said voluntary act.

3. The defendant further answering admits and alleges that he claims title to said land under the said act of Congress, approved May 15, 1856 and the said amendatory act of June 2, 1864; that defendant has no knowledge or information sufficient to form a belief whether said tract of land lies a distance of more than 15 miles from the line of said railroad as constructed, but alleges that the same is situated within six miles of the line of the said Iowa Central Air Line railroad, as the same was located and definitely fixed and that the same is situated within 20 miles of the said "modified" line and the same was included within the provision of the said act and the amendment thereto.

4. The defendant further answering alleges that on the 27th day of December, 1858, the said tract, with others, was duly certified by the Secretary of the Interior, as enuring under said act to the said Iowa Central Air Line railroad, and by means thereof, and of the said act of Congress, and said amendment thereto, the said Cedar Rapids and Missouri River Railroad Company became and was the absolute owner of said land; that afterwards the same was conveyed by said company to the Iowa Railroad Land Company, and on the 13th of February, 1888, the last-named company conveyed the same to the defendant, and by virtue thereof the defendant is now the absolute owner thereof.

5th. And the defendant further answering says, that the alleged cause of action set out in said amended petition, did not accrue at any time within ten years prior to the commencement of said action, and that plaintiff's cause of action (if any he may have) is barred by lapse of time, and his own acts, and those of his grantors, and plaintiff at this time should not be permitted to maintain this action.

Defendant hereto attaches an abstract of his title to said tract of land, and on the trial of said cause will offer the original or record copies of said instruments herein set out.

6. And the defendant further answering says that said defendant's grantors, the Cedar Rapids and Missouri River Railroad Company and the Iowa Railroad Land Company, from the year 1866 to the year 1884, both inclusive, have annually paid the taxes upon said land, which said taxes were annually levied by the proper officers of Linn county, for State, county and other purposes, and were collected by the proper officers of said county, and said taxes were assessed to said defendant's grantors, and defendant has paid such taxes so levied ever since, and by reason thereof the said plaintiff as the grantee of said county is estopped from claiming and asserting title thereto.

And defendant further says that by reason of the lapse of time since the certification of said land, as aforesaid, to said railroad company, and the payment of taxes thereon, as aforesaid, the said claim to said land by said defendant is stale and inequitable.

Wherefore defendant demands judgment for costs, and that the title to said land be quieted therein as against the claims of the plaintiff thereto.

E. S. BAILEY,
N. D. PARKHURST,
Defendant's Attorneys.

6 *Testimony.*

On the 25th day of November, 1889, this cause came on for trial before the court, it being of the October term of said court, and thereupon the plaintiff offered the following depositions:

The defendant objected to the introduction of any parol testimony showing or tending to show the character of the land in controversy, on the ground that such testimony is incompetent and immaterial. (This objection to apply to each and every other deposition introduced.)

HENRY POWERS' deposition, taken October 26, 1889, read:

I have resided in Benton county about 28 years and am acquainted with the land in controversy, and have been for 28 years, and have lived close by it; my land corners wit- it; there is a lake right along my land north and west of this land; it gets 12 to 15 feet deep when the water is up; this land lies right off to the east and gradually rises up and down; it has been dry the last two or three years, but it used to mire cattle, but now it is filled up some and is still dry; I suppose on an average it is swampy for a considerable of it, nearly half; in ordinary seasons somewhere near half would be swampy; not suitable for cultivation of crops; a portion of it overflows in ordinary seasons; it overflows badly; it would not be considered farming land in ordinary stages; it overflows 10 feet to three inches deep; in ordinary stages of high water more than five-sixths of it is submurged; about one acre on the east line is out; in the last 28 years this tract, or the greater part of it, has been under water every time the river has been up and I have been there; if the river gets out of its banks it runs over; there has not been much change in the surface of it since I knew it; sometimes it overflows in June; almost every year for the last 28 years there has been an overflow in June; till the river went down
7 this land would be under water, all but the strip on the east side; it would not be suitable for farming purposes because it overflows; sometimes it is submerged a few days, sometimes two weeks, and sometimes runs to three; it would not be suitable for crops, they would not be worth anything; the water is a current; it would be sufficient in times of an overflow to wash out any crops; there is plenty of driftwood and rubbish; grass would not be worth much; it would not be worth anything for mowing purposes; with the exception of the last two or three years, a portion of the land would be overflowed about every year since 1876; whenever the river gets up so as to run over the banks, over half of the land would be submurged most every year since '76.

ELI HALL testified (by deposition): I reside in Benton county, Iowa; have lived there for past 25 years; have lived eighty rods north and eighty rods southwest from lands in suit; I know the land in suit; part of it is wet and swampy in northwest corner and on west line; about five (5) acres of tract in suit is wet and swampy; during the last 25 years I have known the greater part of this tract to be overflowed, say ten years or one-half of the time; in ordinary stages of high water 37 acres out of 38 would be submerged, I should say, to the depth of three or four feet for two weeks at a time; the highest part of it was submerged last spring; on account of its swampy character in past and its being subject to overflow, no part of it would be suitable for farming purposes; the crops would be washed out by the overflow in June; it would be worthless for farming purposes; the overflow is caused by a current sufficiently strong to wash the soil and dirt; it washes it to such an extent that it could not be used for feeding purposes; it has been of that character every year since I have known it; there has been no change in the general surface of the land for the last 25 years, nor in the character of the river; there is a cornfield from 60 to 100 rods
8 southeast of this land that is higher than this land from five to six feet; the tract east is better land, better soil and higher land; the tract west is bluffy.

Cross-examination:

With the exception of the overflow, I should say about five acres in ordinary seasons is swampy, muddy land. The balance of the tract is sandy land. If it didn't overflow it might be cultivated, but nothing would grow on it. I saw cattle feeding on it. On that portion of the tract I call dry, there is a little grass, and some scrubby timber—ash, jack oak, elm and crab-apple trees. It is about three-quarters of a mile from the river. The overflow is from the river.

Redirect:

It has been unusually dry the last three seasons.

THOMAS DENNIS testified (by deposition): I have lived near the land in suit, two miles below it, for fifty (50) years. The general lay of the land is about the same as it was 50 years ago. The river has changed its bank a little. I know the land; its character as to being swampy and subject to overflow was about the same fifty years ago as it is now.

Four or five years after I came it was extremely wet, and the river was over it about all summer. In ordinary stages of high water fifty years ago, I suppose the greater part was flooded. It is my opinion, it has been entirely submerged. It would be an inferior piece of land to farm. It would be a very hazardous thing, on account of the overflow, and the sandy condition of the soil. If an overflow should occur in June or July, I suppose corn, oats or wheat would be ruined. It would cover them with mud and sand. I

think the river has been over it oftener the first thirty years than the last twenty. It overflows generally about breaking-up time. The worst floods and the oftenest come in June and July. It was a noticeable thing after we came here that we had a flood
9 ever- seven (7) years, that would flood the bottoms high, and maybe the balance of the seven years there would be occasional floods that would flood the whole bottom. That was in the summer. In ordinary stages of high water, it would affect the land for two or three weeks; and I have known it under from seven to eight; so that the land was pretty much all flooded. I have known it two seasons, that way. In ordinary stages of high water the land is submerged by a current and some back water. I presume the current is sufficient to wash the soil and sand.

Cross-examination:

From my personal knowledge I cannot say that I have seen this land under water at all. My answer in the direct examination is based upon what I have seen of the land, and the surroundings of it, and the appearance of high water upon it. I have seen the water around it, and it had to be over it to be around it. I have seen it along the bluff below. I have never particularly examined it. Leaving out the overflow, all but five acres is tolerably dry, with some timber upon it.

STEVE MOBERY testified (by deposition): It has been about twelve years since I first saw the land in suit. I have not seen it frequently until the last three years. In May, two years ago, I saw it in times of ordinary high water. It was all under water but two or three acres. We ran over it with a boat, and in some places the water would be six or eight feet deep; then it would be shallow. It stood up well onto three weeks, but I do not know about the depth. It got so that we could go with a horse. I guess it was about as high as it usually gets in that season of the year. The tract of land eighty rods southeast of this is higher than this land. It was not submerged at the time I speak of. I should say that this land was not suitable for general farming purposes any year. It overflowed from a swift current—swift enough to wash away the soil
10 or sand, and would have washed away growing crops. In ordinary stages of high water about 37 acres are submerged. It has been extremely dry for the last three seasons. If a crop of corn, oats or other grain had been planted there, they would have burned up. I do not believe that it is possible to grow or mature a fair crop when the land does not overflow.

Cross-examination:

Leaving out question of overflow, I don't think half of this land is swampy.

E. A. MCARTHUR testified (by deposition): I have lived for ten years last one mile and a quarter from this land, and have been acquainted with it for about nine or ten years; in ordinary stages

of high water it overflows—a portion of it; I should say four-fifths of it; I have seen it in high water; I was not close enough to tell, but I always thought the greater portion; the character of the soil is sandy; about two-thirds extremely sandy; I would not think it fit for cultivation for reason, too sandy; too dry for crops planted or sown on the premises; they would not mature; I have seen evidence of chunks and stuff washed out there; it is not practicable to use the land for general farming purposes, without protection by dams to keep the water off.

Cross-examination:

I have seen it when the water was up a little, but not high, several years ago; it was less than half under water; I never was there when the water was up; in reality I don't know much about it from being on the land.

Redirect:

I have been on the land after these inundations testified to.

J. M. HAY testified (by deposition): I am 22 years old and know the land in suit; have seen it about every two weeks for last
11 four or five years; I have seen it in ordinary stages of high water; it was all but two or three acres under water; it was from a foot to ten feet deep; a swift current; it would have washed away crops; I have seen the premises submerged only once; that was two years ago last May; I should call it ordinary high water; there are about five or six acres of swamp or slough land; balance is sandy, so as to — unfit for agricultural purposes; I have seen the premises at times when there was no water on them; various times during the summer months; there was not much of anything growing on the sandy land—on account of the sandy soil; I saw driftwood on there; holes dug out all over; no part of the premises are suitable for agricultural purposes or the raising of crops; to raise crops it would be necessary to build dams.

Cross-examination:

I am son of the plaintiff; the overflow of two years ago was caused by rains up north; there is some big tall wild grass on this land, and a few scrub trees; in the central portion it is sandy; I have seen cattle on the tract all seasons of the year except winter; along the west side five or six acres can be cultivated, leaving out the question of overflow; the balance, leaving out the question of overflow, is too dry and too sandy for cultivation; I have never seen the water on this tract but once, but I have seen the effects of high water by cutting holes and washing and tearing down the fences.

Redirect:

I mean that the land has not been submerged but the once; but I have seen it but once.

JAMES B. FORD testified (by deposition): For the last six years I have been on this tract of land several times; I had stock pastured on the land; I have seen the premises submerged every time
12 the river gets up out of its bed; that is about every year, or every spring; sometimes during summer and fall. In ordinary stages of high water all but two or three acres are under water; I have seen it nearly every year; it would run from a foot to six or seven feet deep; a slow current; it is very sandy; not suitable for agricultural purposes; crops would wash out. In high water it stands there for five or six days; it would be necessary to build artificial dams to prevent the overflow.

J. H. RICHARDS testified (by deposition): I have known the premises about 25 years; there has been some little change in their general surface by reason of drifts of sand; I should consider it unfit for any purpose but grazing; it is subject to overflow, except an acre or two; I have seen indications of high water there; particularly driftwood; I have noticed indications of wash on the higher portions; I don't think it could be used for general farming; it would be hazardous to attempt to cultivate anything, by reason of the overflow. I should say a portion of it was unfit for cultivation, by reason of its swampy or wet character; not able to state as to the amount, because I am unable to locate the land exactly.

JOHN DENNIS testified (by deposition): I am 31 years old; have known the premises ever since I was ten years old; I have seen the land when I was ten years old; for six or seven years every summer I have seen it submerged about every season; it might be in the spring, or later, just as it happens; I have seen it both in spring and in summer; I am not able to answer how much would be submerged in ordinary stages of high water, but I should judge, from the lay of the land, the greater portion would be, and it would be just so long as the river staid up—a day or two or a week or more; it is reasonably sandy; I would not consider it fit for anything outside
13 of pasturage; a current goes across it; washes sand, driftwood; growing crops would be drowned out; the river frequently stays up long enough to destroy the crop; it would be necessary to build dams to protect a crop; it could not be successfully raised without dams, if we had rains sufficient to raise the river out of its banks. Such has been the case frequently.

Cross-examination:

I suppose I have seen this tract overflowed, but I would not say for a certainty; it is not dry enough to be plowed and cultivated; of course if there is six feet of water it cannot be cultivated; by cultivation I understand to be dry enough to be cultivated during the season, that is while the crop lasts.

DANIEL RICHARDS testified (by deposition): I have been acquainted with this land for most of the time for 48 years; the surface or character of the land has been pretty much the same; a little

sand perhaps has been thrown up; I never saw it when the water was high; I have been over the land immediately after high water and have noticed drift left by high water, and marks on the saplings that was left there by high water; I noticed these indications over pretty much all of it, and on the higher portions of it; it is not suitable for cultivation on account of its sandy condition; if the sandy soil was plowed it would wash away in big measure; I noticed occasionally pools caused by high water; I think it would not be possible to successfuly raise a crop without some artificial means of preventing water in times of overflows from washing it out.

J. D. HAYS testified (by deposition): I have known the land in suit about eight or nine years; I am plaintiff in this action; I have known it since 1856; since then I have seen it overflowed with water frequently, but how often I could not state; it goes under once a year and often more than once; in 1857 I worked there in that bottom in water all the year; during two or three months it
14 was largely submerged; the greater part most of the time; in ordinary stages of high water it becomes overflowed; last May it was almost entirely overflowed; not more than two or three acres out; that was about an average stage of high water; it comes about every year; it is sandy; a strong current in times of overflow; it would clean out any growing crop; no sane man would consider it fit for grazing purposes of any kind; there is a swift current which would carry off a crop.

Cross-examination:

These overflows occur usually in June and July; sometimes again in the fall.

The plaintiff offers and read in evidence the deposition of Robert Quinn, taken on behalf of defendant October 5th, 1889.

ROBERT QUINN testified: I have known the land in suit since 1865, and have seen it most every day; in 1865 part of the time it was dry and part of the time wet; during a dry season there is probably about thirty acres of it dry and sandy; I don't think there has ever been a season since I have been there but what it was overflowed, except this one; it would effect the whole of it, except a little rise of ground; I have passed over the west part of the tract in a boat in June and July; probably one-third of it; about ten years ago in June I fished buffalo fish in center of tract; the overflow was a little unusual; it was about what we would expect every year; there is timber on the west side; it is very dry part of the season.

Cross-examination:

Three-fourths or more of it in time of overflow is entirely submerged to the depth of from one to six feet; about the month of

June of each year since 1865, for days at a time, three-fourths
15 or more of it are under water, except two or three years; these rises in the river occur about the month of June; in 1876 I don't think there was one-half acre but what was under water; every year or two it is entirely covered, except from five to ten acres; if it should set in a rainy time it would spoil corn and other grain; I would not consider it suitable for general farming purposes.

Redirect:

On the west there is good pasture land; that is on the west part of the tract; cattle graze over a majority of it; I have seen them grazing several hundred times; three or four months in the year.

(At the close of the reading of each of the foregoing depositions, the defendant moved that the same be excluded, for the reason, that the testimony of each of said witnesses related to the character and quality of the land, not at the time of the date of the grant, which is September, 1850; but at some subsequent time, to wit, ten years, or more, later.)

The plaintiff read in evidence a stipulation signed by the parties as follows: "It is agreed,

(1.) That it is seventeen miles from the tract of land in controversy to the nearest point in a direct line, to the Cedar Rapids and Missouri River railroad; now the Chicago and Northwestern railroad, as constructed, built and operated. (2.) That said railway was built, constructed and being operated on the present line of the Chicago and Northwestern railway for a distance of about 100 miles west of Cedar Rapids, Iowa, on and prior to the 2d day of June, 1864."

(Objected to by defendant as incompetent, immaterial and irrelevant.)

Plaintiff read in evidence the following stipulation:

"It is stipulated that the assessed value of the land in controversy for each and every year since 1866 to the present time,
16 as returned by the assessor, as shown by his assessment books, is $95.

"That the N. W. ¼ N. W. ¼ of section 19, township 85, range eight, was selected as swamp and overflowed land and has every year since 1866 been assessed at $95, by the assessors making such assessments as shown by the books returned by him."

(Objected to by defendant as incompetent, irrelevant and immaterial.)

Plaintiff offered in evidence the following deed:

"In consideration of one dollar, we, J. H. Davis, James Yuill and M. E. Bunting, in our official capacity as supervisors of Linn county, State of Iowa, hereby sell and convey and forever quitclaim to J. D. Hayes, the following-described premises in Linn county, Iowa, to wit:

S. W. ¼ of N. W. ¼ section 19, township 85, range 8; to have and to hold the said premises unto the said J. D. Hayes his heirs and

assigns forever with all and singular the appurtenances thereto belonging.

Signed the 4th day of September, 1888.

J. H. DAVIS,
Chairman Board of Supervisors, Linn County."

(Acknowledged same day by J. H. Davis.)

Objected to as incompetent and immaterial, and for the further reason that the chairman of the board of supervisors has no authority to execute the conveyance to this land, and further that there is no evidence that the board of supervisors had authorized him to execute it, and there is no evidence that the board had ever made a contract for the sale of the land to the plaintiff.

It is conceded that the plaintiff and the members of the board of supervisors will swear that on or about the 4th day of September, 1888, plaintiff purchased the land in controversy from Linn county, Iowa, through the board of supervisors for the sum of $50,
17 which was paid at that time by the plaintiff giving his promissory note therefor, which was accepted by the board in full payment of the value and contract price.

(Objected to by defendant as incompetent, immaterial and not the proper mode of proving contract made by the board of supervisors, and that the record of the board is the proper proof of the facts.)

Plaintiff offers in evidence chap. 84, Acts of the 31st Congress, being the swamp land grant act, approved September 28, 1850. U. S. Statutes at Large, vol. 9, p. 519.

Also, chap. 103, Acts of 38th Congress, being an act to amend the Iowa railroad land grant act, approved June 2, 1864, and especially sec. 4. U. S. Statutes, vol. 13, p. 95.

Here the plaintiff rested.

Defendant's Testimony.

The defendant offers in evidence the deposition of G. A. MITCHELL, as follows:

I have been a civil engineer ten years and have had experience in examining lands as to whether it is wet or dry; I have been acquainted with the land in controversy three months; I first saw it June last; I found it nearly all dry; considerable sandy soil; covered with sand, brush, stunted burr-oak trees, ash, elm, and crab-apple trees; in the northwest corner is a swampy piece of a little over three acres; all the rest is dry, except a piece on the west side and in the southwest corner, covered with growing timber, containing 3.66 acres, subject to occasional overflow of water; also a small lake containing about ¼ acre, subject to occasional overflow from the creek when it is very high; from the indication of overflow there would be about 4½ acres affected by overflow and three acres which is swampy; there are no ditches or other artificial means of

drainage; the land is all susceptible of cultivation in grain
18 by reason of wet or swampy character, except a small strip bordering the northwest corner and southwest corner, and a small ravine; the dry land is about 37½ acres; it is suitable for farming purposes without artificial means, except to clear away the brush; about thirty acres fit for cultivation, and about 7½ acres that a part of it would have to be drained, which would make good meadow or hay land; when I made the examination the surrounding country was wet.

(Plaintiff moved to strike out all the testimony of the witness, for the reason it is incompetent, immaterial and irrelevant, it appearing from the testimony that the knowledge of the witness of the land is limited to a period of within three months preceding his examination, and in no manner tends to prove any issue in the case.)

WM. FRAZIER testified (by deposition): I have had five months experience in examining land; I saw this land in June last, and was with Mr. Mitchell in making the survey as chainman; the land in the northwest corner was swampy; no trees growing on it; the land between the east line and the stream and the north and south lines was all good farm lands; about thirty acres.

Cross-examination:

The land I speak of as dry land and farm land does not overflow in times of high water; I knew that from the general lay of the land; about thirty acres does not overflow in times of high water; it was dry weather when we were there; it had been raining two or three days; hard rain; it was muddy; the creek on the west side had been out of its banks; there had been a rise in the Cedar river two or three days before we made the survey; the river had risen more than two feet; the date of the survey was June 11, '89.

(It is conceded that the plaintiff objects to each and every interrogatory propounded to the witness- Frazier and Mitchell,
19 and to all the other witnesses at the time they were severally propounded, for the reason that they were incompetent, immaterial, irrelevant, leading, foreign to the issues, and not tending to prove any of the issues in the case.)

The plaintiff moved to strike out all of the direct examination, and also the redirect examination of the witness Frazier for the reason that it shows upon its face that he had no knowledge of the condition of the land prior to June, 1889, and there is no claim by the witness to know what its condition was prior to that date.

H. B. MCKEAN testified (deposition): I have known the land in suit 20 years; about thirty-five acres of it can be cultivated; I am a farmer; I have never measured it; thirty acres or over could be cultivated in corn or other staple crops; the northwest corner and the overflow pond are swampy; I did not see any ditches or drains; I have been on it four or five times or more; the first

about 1869; there is no change in the character of the land, as to wet or dry, different from the time I saw it in 1869.

Cross-examination:

I have been over it four or five times at least—after cattle; in general I made a careful examination; I assessed it, usually from February first to April; I had occasion to pass over it the last part of the winter; I lived sixteen or seventeen years directly south of it; during that sixteen or seventeen years I did not have occasion to see the land from the first of May to September; in my judgment, there is about thirty acres that could be farmed continuously, unless they had extremely high water, as in Cedar Rapids several years ago; it would not be affected to hurt it only in such times of high water.

(Motion by plaintiff to strike out all this testimony for the
20 reason that it is confined to twenty years preceding, and witness does not pretend to know its condition at the time of the swamp land grant in 1850, or at any time prior to 1860.)

C. W. YATES testified (by deposition): I have lived in Linn county for 40 years and over; I know this land; thought of buying it until about three or four years ago; I went to look at it to buy; there is but two or three acres that is swampy; about 2½ acres in the northwest corner I would consider swampy; I should think two-thirds of the balance was tillable and would bear grain, and the balance, except the pond, would be pasture; I don't think ditches would be necessary as a 1,000 acres overflows in the same way; all of this would not overflow, however; high water would only last a few days, when the snow goes off; I have known it but two or three years, and have never been on it in high water.

(Motion to exclude, same as to evidence of preceding witness.)

JAMES MCARTHUR (deposition): I have known the land since 2 years ago last June; I was on it then; I had a contract with the railroad company for it; it would be capable of cultivation in a dry year like this, about 30 acres of it, but only in a dry summer; you could pasture all of it; I have been a farmer and stock-raiser most of my lifetime.

Cross-examination:

I never saw the land but twice; I never saw it in time of high water; for a year before I saw it it had been unusually dry; if the year was a very wet one the thirty acres could not be cultivated; I do not know whether or not it or a greater part of it is covered by water in times of ordinary high water; there is land that gets pretty badly overflowed that there is good crops raised on.

(Same motion.)

JOHN RAILSBACK (deposition): I have known this land since
21 1840; I have been a regular visitor on that bottom and on that piece of land ever since that time to within the last two

or three years; I saw it several times in the spring of 1840; from my knowledge of it in 1840 it is capable of raising corn; it is not necessary to use ditches or drains to cultivate it; all the east portion between the overflow channel and the eastern, except a small pond or two, is dry and fit for cultivation; I have seen the land in the spring and summer of the various years since 1840; my knowledge of it is based on actual examination.

Cross-examination:

In saying the land is suitable for tillage purposes, I mean it is not naturally swampy; in answering in regard to the dry character of the land I had reference exclusive to the fact that it was not naturally swampy.

W. J. BARBER: I have known the land for five years; it is all susceptible of cultivation in corn and other staple products, except three acres; the entire tract is dry except about three acres; there are no ditches on it.

Cross-examination:

When I speak of it as being dry and fit for farming purpose I refer exclusively to the fact that it is not naturally swampy, from the fact that I live on the same half of the river bank; there is water comes on mine, but it never stays; I do not mean that this land for the last five years has not been submerged in times of high water; but water does not remain on it; in times of high water part of this land is submerged; I never saw it all overflowed; I have seen three-fourths or more submerged and the whole surrounding country was submerged at the same time; twice in five years.

ROBERT MCCORMICK, defendant: I have been in possession of this land for two years; I fenced it; I have known it 14 years; it is not too swampy to cultivate, and is capable of raising
22 corn; about thirty acres; no ditches or tiling on it; there is oak, ash, etc., on it; the first five years I was over it every evening hunting my cattle; after that once a week salting my cattle.

Defendant offered in evidence the "certified list" of lands granted by Congress to the State of Iowa for the Iowa Air Line railroad—now Cedar Rapids and Missouri River railroad—so far as the same relates to and including the land in controversy. Said list contains 1,809 acres.

(This list is in the usual form—designates lands within the six-mile limits, including the land in suit, signed by the Commissioner of the General Land Office, December 23, 1858; approved by the Secretary of the Interior, December 27, 1858.)

To which the plaintiff objects for the reasons, 1st, that the list shows upon its face that the lands were certified by the Secretary of the Interior unlawfully and without authority of law, and in direct conflict with the act of May 15, 1856, under which title was

claimed, the Iowa Air Line Co. having at the time of the certification built no road, were entitled to no lands; and second, that it was made prior to the time that the Cedar Rapids and Missouri River Railroad Co. was entitled or authorized to construct its road, or were subrogated to the rights of the Air Line Co.; and third, that it was made after the United States had parted with its title to the land to the State of Iowa, and by the State of Iowa to Linn county, the grantor of the title, and that the United States had no title to the lands at the time they were certified in December, 1858, and hence the testimony is incompetent, irrelevant and immaterial. And plaintiff objects to the offer of any list containing any land or referring to any land other than the land in controversy, as immaterial.

Plaintiff offers in evidence the certified list of land in Linn county that are certified and approved to the State of Iowa by the Secretary of the Interior, under the act of Congress of May
23 15, 1856, and which inures to the Cedar Rapids and Missouri River Railroad Co., which list contains 668 acres, including the land in suit.

(This list or certificate is not printed in full. It is in the usual form according to the provisions of chapter 167, Acts of the 18th General Assembly of the State of Iowa, dated January 17, 1881, signed by the governor and register of State land office.)

(To which the plaintiff objects for the same reasons as to the last preceding "certified list.")

Defendant offered in evidence a deed of the Cedar Rapids and Missouri River Railroad Co. to the Iowa Railroad Land Co. of the land in dispute, with others, dated March, 1870, and recorded in recorder's office of Linn county, March 25, 1870, in Book 4, p. 281.

(Objected to by plaintiff as incompetent, irrelevant and immaterial.)

Defendant offers in evidence deed from the Iowa Railroad Land Co. to the defendant of the land in dispute, dated October 30, 1885, recorded June 11, 1888, in vol. 163, p. 66.

(Objected to by plaintiff as incompetent, irrelevant and immaterial.)

Defendant read in evidence the following stipulation:

In order to avoid the introduction of evidence upon the subject hereinafter mentioned, it is stipulated and agreed by and between the parties: That the county of Linn, prior to 1875, made selections of swamp lands as shown by the records of the register of the State land office, which selections so made embrace certain tracts in section 19, township 85, range 8, in Linn county, and among them the N. W. ¼ of N. W. ¼ and the S. E. ¼ of the N. W. ¼ of said above-named section. The said selections so made, or a copy thereof, are on file in the secretary of state's office in the State of Iowa,
24 and that the tract in controversy was not included in any such selections, and that so far as shown by any record of the State or county the tract in controversy has never been patented to the State nor by the State to the county.

The above admissions and stipulations are made subject to any

and all objections thereto, or to the facts admitted thereby, that may or can be urged on account of incompetency, immateriality or irrelevancy by the plaintiff in said cause, the right to make any such objections and urge the same being hereby reserved and preserved.

The defendant offered in evidence tax receipts signed by the treasurer of Linn county, Iowa, showing that the Cedar Rapids and Missouri River Railroad Co. and the Iowa Railroad Land Co. and the defendant have successively annually paid the State, county and other taxes assessed and levied on said land from the year 1866 to the year 1888, both inclusive, amounting in the aggregate to $72.53, and that the interest on such payments from the time they were respectively made, at the rate of 6 per cent. per annum, amounts to $66.54.

To which the plaintiff objects as being incompetent and immaterial, no evidence having been shown of the right of the assessor to make the assessment, or that it was done with the knowledge and consent or direction of Linn county, plaintiff's grantor; and second, that such assessment and levy was unlawful, and without right or authority of law, and not made by Linn county or any authorized agent of Linn county, and that the same, and each thereof, for each and every year, is null and void, and that the payments of taxes by the defendant and the several railroad companies was voluntary and on their own motion, and that each assessment was made, not by the county, nor by any agent of the county, but was procured at the instance and by the defendant and his grantor, and the grantor of the grantor, and that the county nor the plaintiff are neither bound thereby.

25 The foregoing is all the evidence offered or introduced on the trial of said cause.

And thereupon, on the twenty-fifth day of November, 1889, it being still of the October term of said court, judgment was rendered in favor of said plaintiff and against said defendant, establishing and quieting the title to said land in the plaintiff.

And afterwards, on the 7th day of February, 1890, the defendant duly appealed from said judgment to the supreme court of Iowa, and served notice thereof upon the plaintiff's attorneys and the clerk of said district court and on the same day filed the same with proof of service with said clerk.

E. S. BAILEY,
N. D. PARKHURST,
Appellant's Attorneys.

26 (Endorsed:) "Due and legal service hereof accepted this 29th day of March, 1890. Davis & Voris, att'ys for appellee."

And at the May term, 1890, of said court said cause was duly submitted on the foregoing record. On the 28th day of May, 1891, said supreme court having fully considered the record, filed its decision (opinion) in writing, the same being in the words and figures following, to wit:

27 In the Supreme Court of Iowa.

MAY 28TH, 1891.

J. D. HAYES
vs.
ROB'T MCCORMICK, Appellant.

Appeal from Linn district court—J. H. Preston, judge.

Action to quiet title to a forty-acre tract of land in Linn county; decree for plaintiff and the defendant appealed.

E. S. Bailey and W. D. Parkhurst, for appellant.
Davis & Voris, for appellee.

GRANGER, *J.:*

The respective parties trace the origin of their titles to grants of land by the United States, that of plaintiff being to the swamp land grant act, approved Sept. 28th, 1850, as amended, and defendant to Iowa railroad grant of May 15th, 1856, as amended. The claim of the record title of the parties is as follows: That of plaintiff, the act of Congress of 1850 granting to the States the swamp
28 and overflowed lands unfit for cultivation within their boundaries; the act of the Gen'l Assembly of 1853 granting to the counties the swamp and overflowed lands within their limits, which were by the act of Congress in 1850 granted to the States, and a conveyance by the county of Linn to him Sept. 4th, 1888.

That of the defendant, the Iowa railroad grant of 1856, a certification of the land under the act by the Commissioner of the General Land Office Dec. 23d, 1858, approved by the Secretary of the Interior Dec. 27th, 1858; which list was, under chap. 167, Acts 18 Gen'l Assembly, signed by the governor and attested by the secretary of state of Iowa for the Cedar Rapids & Missouri R. R. Co.; which company conveyed the land to the Iowa R. R. Land Co., and it to the defendant, October 20, 1885.

It is important that we first determine from the evidence in the case a question of fact as to the actual character of the land Sept. 28, 1850, which is the date of the grant to the States of the swamp lands by Congress. No intelligent discussion of the question can be given without quoting a volume of evidence that would be un-
29 warranted and of no practical use. Our examination of the evidence leads us to the conclusion that at the date of the grant the tract was overflowed land, within the meaning of the act referred to, and the case will be considered with that as an established fact.

II. The land in question is the S. W. ¼ of N. W. ¼ of sec. 19, township 85, range 8 west. A stipulation in the case is as follows:

"In order to avoid the introduction of evidence upon the subject hereinafter mentioned, it is stipulated and agreed by and between the parties: The county of Linn prior to 1875 made selections of swamp lands, as shown by the records of the register of the State land office, which selections so made embrace certain tracts in sec-

tion 19, township 85, range 8, in Linn county, and among them the N. W. ¼ of N. W. ¼ and S. E. ¼ of the N. W. ¼ of said above-named section. The said selections so made, or a copy thereof, are on file in the secretary of state's office in the State of Iowa, and that the tract in controversy was not included in any such selections,
30 and that so far as shown by any record of the State or county the tract in controversy has never been patented to the State nor by the State to the county."

It is said, in argument, that the fact that the land has never been selected as swamp land ought to be conclusive proof that it is not, and that a presumption should follow the acts of the officers appointed to make the selections that they did their duty. That such a presumption should obtain to the extent of devolving on the plaintiff the burden of showing that land was actually swampy or overflowed so as to bring it within the grant meets with our approval, but that it should obtain to the extent of becoming conclusive as against the actual facts is a rule unsupported, we think, by either reason or authority.

That the grant vested the State with the title to such lands as were within the purview of the act is so well established on authority that only a reference to the fact is required. It has been held that the act by its own force operated to pass the title at once. Allison *vs.* Halfacre, 11 Iowa, 450; R'y Co. *vs.* Smith, 9 Wall., 95. The provisions of the act of 1850, providing for the selection of the land, has been held of no greater force than to secure an identifica-
31 tion of the lands included in the grant, and that in effect it could not operate as a limitation upon the grant. R'y Co. *vs.* Brown, 40 Iowa, 333. In R'y Co. *vs.* Smith, *supra*, the principal question in the case was as to the kind of evidence competent to show the character of the lands.

By an act of Congress land had been granted to aid in the construction of railroads in the State of Missouri, and from the grant lands granted under the act of 1850 were reserved.

The case involved the identification of lands under the two acts and the manner of doing it. To establish the reservation, the swampy character of the land was to be shown. The Secretary of the Interior had neglected or failed to furnish the lists and the land stood as unselected by any of the ways provided in the act. The case submits this pertinent query, "Must the State lose the land, though clearly swamp land, because that officer has neglected to do this?" The case, after referring to the difficulties under which the Secretary of the Interior must labor to know the fact from
32 which to properly certify the list, again inquires, "Why should not the same kind of testimony, subject to cross-examination, be competent, when the issue is made in a court of justice, to show that they are swamp and overflowed, and so excluded from the grant under which plaintiff claims a grant which was also a gratuity?" The following is the conclusion in the case: "The matter to be shown is one of observation and examination, and whether arising before the Secretary, whose duty it was, primarily, to decide it, or before the court, whose duty it became be-

cause the Secretary had failed to do it, this was clearly the best evidence to be had and was sufficient for the purpose.

"Any other rule results in this, that because the Secretary of the Interior has failed to discharge his duty in certifying these lands to the States, they therefore pass under a grant from which they are excepted beyond doubt, and this when it can be proved by testimony capable of producing the fullest conviction that they were of the class excluded from the plaintiff's grant."

33 Appellant seems to question the correctness of the holding in R'y Co. *vs.* Smith, on authority, and refers to French *vs.* Ryan, 93 U.S., 169. In that case the action was at law (ejectment); the land had been properly selected and listed by the Secretary of the Interior, and a patent issued in pursuance thereof, and the plaintiff as a grantee under the railroad grant sought to impeach the conclusiveness of the patent by evidence showing that the land was not, in fact, swamp or overflowed land. The opinion attaches particular importance to the fact that the action is one at law, and holds that the evidence in such a case is not admissible and points to a clear distinction between a case where the title following the grant has been confirmed by a compliance with the law as to selections and a patent given by which particular tracts are specified, and one in which no selections have been made nor patents issued. The case refers to R'y Co. *vs.* Smith, and while it says that the holding in that case was "with hesitation and with some dissent in the court," it is in no way disapproved or overruled, but rather

34 justified by additional comments referring to the facts under which the rule was announced. Importance in argument is given to the fact that in all the cases passed upon by this court there had been some kind of selection by the State or counties of the lands in question, even though there had been neglect or failure on the part of the proper officers of the United States; but we do not see how that fact changes the rule. This land being, as we have found under the rule sanctioned in R'y Co. *vs.* Smith, overflowed land, the title passed at once to the State on the passage of the act of Sep't 28th, 1850.

If the plaintiff is not the owner as the grantee of the State, it must be the result of a forfeiture, and under the claim now being considered the forfeiture would result from the neglect of the State to make selection.

But the act granting the land does not make the title in the State depend upon any such a duty, nor does it devolve upon the State any duty in this respect. The selections by the State, as we understand, were made in pursuance of instructions from the Com-

35 missioner of the General Land Office and merely as an aid to the preparation of lists by the Secretary of the Interior. The fact that the State, even in its own interest, aided the officer of the General Government to identify or select the lands belonging to it should not induce a forfeiture as the result of a mistake or oversight. The title of the State was not intended, as the grant is construed, to depend upon selections, but upon actual physical facts. The means of identification were patent to all. The railroad

company took under the grant in its aid with knowledge of the law and with opportunities equal to others to know facts upon which its title would depend. Nothing in the law that we discover required the State, in order to protect its title as against another and subsequent grant, which was a gratuity, to make such selections. The fact that it was swamp land and did not belong to the railroad company is of paramount significance. The company merely took possession of and sold land to which it never
36 had any title. The certificate of the Secretary of the Interior under the railroad grant cannot prevail against a vested title under the grant of 1850.

Mills Co. *vs.* R'y Co, 22 Iowa, 91.

Montgomery Co. *vs.* R'y Co., 38 *id.*, 208.

III. The railroad company and its grantees paid taxes on the land from the year 1866 to 1888, in the aggregate sum of $73.53, and that point is urged as against the right of the plaintiff to recover. Plaintiff obtained the land from the county in Sept., 1888, and no taxes have ever been paid for which he was liable. During the time the taxes were paid, of which complaint is made, the land belonged to the county and was exempt from taxation. Buena Vista County *vs.* R'y Co., 46 Iowa, 226; Howard Co. *vs.* Bullis, 49 Iowa, 519. These two cases also control the question of the county being bound or estopped by the acts of its officers in the collection of taxes.

IV. The written conveyance of the land from the county to plaintiff is as follows:

"In consideration of one dollar, we, J. H. Davis, James
37 Yuill, and M. E. Bunting, in our official capacity as supervisors of Linn county, State of Iowa, hereby sell and convey and forever quitclaim to J. D. Hayes the following-described premises in Linn county, Iowa, to wit: S. W. ¼ of N. W. ¼, section 19, township 85, range 8; to have and to hold the said premises unto the said J. D. Hayes, his heirs and assigns forever, with all and singular the appurtenances thereto belonging.

Signed the 4th day of September, 1888.

J. H. DAVIS,
Chairman Board of Supervisors, Linn County."

It is urged that the instrument is insufficient to pass the title because by Code, sec. 305, it is provided that "no real estate shall be purchased or sold * * * without a majority of the whole board of supervisors voting therefor and consenting thereto." The following stipulation is in the record:

"It is conceded that the plaintiff and the members of the board of supervisors will swear that on or about the 4th day of September, 1888, plaintiff purchased the land in controversy from Linn county,
Iowa, through the board of supervisors, for the sum of $50,
38 which was paid at that time by the plaintiff giving his promissory note therefor, which was accepted by the board in full payment of the value and contract price."

The sufficiency of the instrument of conveyance we need not discuss. It plainly appears from the record that there was between the board and the plaintiff an understanding and such a performance by the plaintiff that he was entitled to a proper instrument of conveyance of the land, and that such a conveyance was intended. If the conveyance is insufficient, it is evidently the result of a mistake against which the law would afford relief. The title of the plaintiff is sufficient as a basis of recovery against the defendant.

V. It is lastly urged that if the title is confirmed in the plaintiff the taxes paid should be refunded. All the taxes paid were when the land belonged to the county, and as he purchased the land as swamp land from the county he had no just reason to believe there had been such payments, but, on the contrary, he had reason
39 to believe otherwise. By the payment of the taxes the plaintiff was not relieved of a burden devolving upon him, so that equity would require him to reimburse.

As to the right of the plaintiff elsewhere we are not to consider. Affirmed.

40 And on the same day a final judgment was by said court directed and duly entered of record in the words and figures following, to wit:

"J. D. HAYES
vs.
ROBERT MCCORMICK, Appellant. } Appeal from Linn District Court.

In this cause the court, being fully advised in the premises, file a written opinion affirming the *the* judgment of the district court.

It is therefore considered by the court that the judgment of the court below be, and it is hereby, affirmed, and that a writ of *procedendo* issue accordingly.

It is further considered by the court that the appellant pay the costs of this appeal, taxed at $20.75, and that execution issue therefor."

41 And afterwards, on the 6th day of July, 1891, there were filed in the office of the clerk of said court the following: Petition for writ of error, writ of error, bond, citation, and assignment of error, true and correct copies of which have been made and retained in the office of said clerk and the originals are hereto attached and returned herewith as a part of this transcript.

42 Supreme Court of the State of Iowa.

Filed Jul- 6, 1891. G. B. Pray, clerk sup. court.

J. D. HAYES
vs.
ROBERT MCCORMICK.

To the hon. the chief justice of the supreme court of the State of Iowa:

The petition of the above-named Robert McCormick, the defendant above named, respectfully shows that in the judgment and de-

cision of the above-entitled cause by the supreme court of Iowa there was drawn in question the construction of certain statutes of the United States and said judgment and decision were against the title, right, and privilege claimed by petitioner under the same.

Your petitioner therefore prays your honor to examine the record in said suit herewith presented and thereupon allow a writ of error in said cause from the Supreme Court of the United States to the supreme court of Iowa, pursuant to the acts of Congress in such cases made and provided.

June 16th, 1891.

ROBERT McCORMICK,
By E. S. BAILEY,
N. D. PARKHURST,
His Attorneys.

[Endorsed:] Supreme court. J. D. Hayes, appellee, *vs.* Robert McCormick, appel. Petition for writ of error. Filed Jul- 6, 1891. G. B. Pray, clerk sup. court. The writ of error, as within prayed, is allowed this 16th day of June, 1891. Joseph M. Beck, chief justice supreme court Iowa.

43 Filed Jul- 6, 1891. G. B. Pray, clerk sup. court.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable judges of the supreme court of the State of Iowa, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said supreme court, before you, between J. D. Hayes, plaintiff, and Robert McCormick, defendant, a manifest error hath happened, to the great damage of the said Robert McCormick, defendant, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 16th day of June, A. D. 1891.

Seal Circuit Court U. S., Northern District of Iowa, Dubuque.

A. J. VAN DUZEE,
Clerk U. S. C. C., Northern District of Iowa.

Allowed.

—— ——, *Judge.*

[Endorsed:] Hayes *v.* McCormick. Writ of error. Filed Jul- 6, 1891. G. B. Pray, clerk sup. court.

44 Filed Jul- 6, 1891. G. B. Pray, clerk sup. court.

Supreme Court, State of Iowa.

J. D. HAYES, Appellee,
vs.
ROBERT MCCORMICK, Appellant.

Know all men by these presents that *I*, Robert McCormick, as principal, and John S. Ely and Charles Weare, as sureties, *and* are held and firmly bound unto J. D. Hayes in the sum of five hundred dollars, to be paid to said J. D. Hayes, his executors and administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors and assigns, executors and administrators, firmly by these presents.

Sealed with our seals and dated this 13th day of June, A. D. 1891.

Whereas the above-named Robert McCormick has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the supreme court of the State of Iowa:

Now, therefore, the condition of this obligation is such that if the above-named Robert McCormick shall prosecute his writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

45 ROBERT MCCORMICK, [SEAL]
By E. S. BAILEY, *His Attorney.*
JOHN S. ELY. [SEAL.]
CHARLES WEARE. [SEAL.]

Signed and sealed in the presence of—

——— ———.

STATE OF IOWA, } ss:
Linn County, }

We, John S. Ely and Charles Weare, being each duly sworn, each for himself says that he is a resident of the State, and is worth more than one thousand dollars beyond the amount of his debts, and that he has property in the State liable to execution to the amount of one thousand dollars and upwards.

JOHN S. ELY.
CHARLES WEARE.

Subscribed in my presence and sworn to before me, the undersigned, a notary public in and for Linn county, Iowa, by the above-named John S. Ely and Charles Weare, each for himself.

It witness whereof I have hereunto set my hand and notarial seal this 13th day of June, A. D. 1891.

[Notarial Seal Chas. T. Smith, Iowa.]

CHARLES T. SMITH,
Notary Public.

The above bond approved this 16th day of June, 1891.

JOSEPH M. BECK,
Chief Justice Supreme Court Iowa.

46 See approval on back.

[Endorsed:] Supreme Court. J. D. Hayes, appellee, *vs.* Robert McCormick, appellant. The within bond is approved this 16th day of June, 1891. Joseph M. Beck, chief justice supreme court Iowa.

47 Filed Jul- 6, 1891. G. B. Pray, clerk sup. court.

UNITED STATES OF AMERICA, *ss:*

To J. D. Hayes, Greeting:

You are hereby cited and admonished to appear at the Supreme Court of the United States, to be held at Washington, District of Columbia, on the 16th day of July, 1891, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Iowa, wherein Robert McCormick is plaintiff in error and J. D. Hayes is defendant in error, to show cause, if any there be, why the judgment in said writ of error — should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 16th day of June, 1891.

JOSEPH M. BECK,
Chief Justice Supreme Court Iowa.

[Endorsed:] Supreme court. J. D. Hayes, appellee, *vs.* Robert McCormick, appel. Citation.

We hereby acknowledge service of the within citation this 2d day of July, 1891.

DAVIS & VORIS,
Att'ys for Plaintiff.

48 Filed Jul- 6, 1891. G. B. Pray, clerk sup. court.

Supreme Court.

J. D. HAYES, Appellee,
vs.
ROBERT MCCORMICK, Appellant. } Assignment of Errors.

The above-named defendant and appellant alleges that in the record and proceedings of the above-entitled cause there is manifest error in this, to wit:

The court erred in holding and deciding—

1. That the title to said land in controversy was in said plaintiff and not in said defendant.

2. That the title to said land passed to the State of Iowa by virtue of said swamp-land grant without any designation, listing, certification, or patent by or on the part of the Secretary of the Interior or other officer of the United States.

3. That the plaintiff had and acquired title to the land under the swamp-land grant, notwithstanding no selection of the same had ever been made by the State or under its authority or any selection or claim therefor had ever been presented to the Secretary of the Interior.

4. That the district court was authorized to assume jurisdiction to determine that the title of said land passed under the swamp-land grant in the absence of any neglect or refusal of the Secretary of the Interior to list or patent the same and in the absence of any application to the Secretary on the part of the State of Iowa to list or patent the same.

49 5. That parol evidence was admissible and competent to show that the land in controversy was swamp or overflowed land within the meaning of the act of Congress of September 28, 1850, at the date of the passage of that act and subsequent thereto.

6. That the certification of said land by the Secretary of the Interior to the State of Iowa under said railroad grant to aid in the construction of the railroad therein mentioned was invalid and void, and that said defendant, McCormick, acquired no title thereto.

7. That the decision of the Secretary of the Interior certifying that the land inured to the State under the railroad grant was not an adjudication that the same did not inure to the State under the swamp-land grant.

8. That the evidence shows that the said land was overflowed land within the meaning of the said swamp-land act.

9. That said parol evidence as to the swampy character of said land was sufficient to overthrow the title of said defendant thereto.

Wherefore said defendant asks that said judgment and decree be reversed.

E. S. BAILEY,
N. D. PARKHURST,
Appellant's Att'ys.

[Endorsed:] Supreme court. J. D. Hayes, appellee, *vs.* Rob't McCormick, app'l't. Assignment of errors.

50 STATE OF IOWA, *ss:*

I, G. B. Pray, clerk of the supreme court of Iowa, do hereby certify that the foregoing is a true and correct transcript of the record, decision, and final judgment in a cause tried and determined in the supreme court of Iowa, between J. D. Hayes, pl'ff and appellee, and Robert McCormick, def't and appellant, as full, true, and complete as the same remain- of record and on file in my office.

I further certify that I have retained in my office true and correct copies of petition for writ of error, writ, bond, citation, and assignment of errors, the original whereof are hereto attached and made a part of the return to said writ of error, and this transcript is made and transmitted as a full and complete return to said writ and in obedience thereto.

Seal of the Supreme Court of Iowa.

In testimony whereof witness my signature and the seal of said court, at Des Moines, Iowa, this 7th day of July, 1891.

G. B. PRAY,
Clerk Supreme Court Iowa.

Endorsed on cover: Case No. 14,745. Iowa supreme court. No. 230. Robert McCormick, plaintiff in error, *vs.* J. D. Hayes. Filed July 16, 1891.

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159-582

Supreme Court of the United States

OCTOBER TERM, 1894.

ROBERT McCORMICK, *Plaintiff in Error.*
vs.
J. D. HAYES.

No. 37

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

STATUTES OF IOWA RELATING TO SWAMP LANDS, AND RAIL ROAD GRANT, AND FURTHER POINTS AND AUTHORITIES.

CHAS. A. CLARK, *For Plaintiff in Error.*

Supreme Court of the United States

OCTOBER TERM, 1894.

ROBERT McCORMICK, *Plaintiff in Error.*
vs. } No. 230.
J. D. HAYES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

STATUTES OF IOWA RELATING TO SWAMP LANDS, AND RAIL ROAD GRANT, AND FURTHER POINTS AND AUTHORITIES.

CHAS. A. CLARK, *For Plaintiff in Error.*

I.

WHAT FEDERAL QUESTIONS ARE INVOLVED.

Where one claimed under the federal constitution that he was entitled to have a note paid in gold or silver coin, and the state court decided that such note was payable in U. S. treasury notes commonly called greenbacks under the act of congress of February 25, this court had jurisdiction to review and reverse the judgment of state courts on writ of error, including an examination and consideration of the evidence relied upon to show that the note was

in gold or silver coin. And it was held that a promise to pay in specie was a promise to pay in such coin.

Trebilcock vs. Wilson, 12 Wall., 687.

And where one party to the controversy claims land under a patent of the United States which is rejected and held invalid by the decision of the state courts, such judgment may be examined and reviewed on writ of error, although the opposing party also claims under a like patent.

Reichart vs. Phelps, 6 Wall., 160.

Where a government patent was defeated by a state court upon the ground that an older patent had been issued, the decision was held reviewable in this court upon writ of error, and upon consideration of the evidence it was held by this court that the older patent was issued by error and mistake which was properly corrected by the commissioner of the general land office in the exercise of his supervisory authority. The question of error and mistake here became a federal question necessarily passed upon by this court in determining the validity of the junior patent.

Bell vs. Hearne, 19 How., 252.

And in the case last cited this court differed from the supreme court of Louisiana as to whether the evidence showed error and mistake as claimed by the plaintiff in error, and the judgment was reversed upon the question of fact thus involved.

Where the decision of the state court was against the validity of an entry of land which had been allowed by the proper officers of the United States, this court has jurisdiction by writ of error to revise that judgment whether the invalidity was decreed upon a question of fact or of law.

This court on writ of error in such case considered the evidence of fraud and determined and adjudged that the entry was obtained by imposition, false testimony and fraud practiced on the register and receiver and accordingly held such entry to be void. Here the evidence relied upon to show fraud on the one side and honesty on the other became federal questions necessarily involved in the determination of the title.

Lytle vs. Arkansas, 22 How., 193.
See also Magwire vs. Tyler, 1 Black, 195.

Where a declaratory statement before a register and receiver is relied upon as giving a better equitable title to land than a patent duly issued, and the decision is against the patent in the state courts, such decision may be reviewed on writ of error here.

On such review evidence showing the sufficiency or insufficiency of the declaratory statement becomes a federal question.

Johnson vs. Tousley, 13 Wall., 72.
Sanson vs. Smiley, 13 Wall, 1891.

Whether a deed was sufficiently stamped under the internal revenue law to entitle it to be admitted in evidence in the state courts is a federal question which may be reviewed on writ of error. The question here involved was purely one of evidence.

Hall vs. Jordan, 15 Wall., 394.

Where this court had determined the validity of the complainant's legal title to lands on writ of error to a state court, and the court thereupon decided that complainant's title could not be enforced in the pending litigation upon the ground that he had a plain, speedy and adequate remedy at law, it was held that this presented a question which might be reviewed here on writ of error.

Tyler vs. Magwire, 17 Wall., 253.

Where in the state courts of California, in an action at law to recover the possession of real estate, the plaintiff claimed under a title from the United States and the defendant claimed under a grant from the United States to California, and a patent from the state of California to him, this court on writ of error held that it had jurisdiction to reverse the decision of the state court, inasmuch it refused to receive evidence tending to show that at the date of the grant to the state the land was not subject thereto because it had then been pre-empted and was thus within one of the provisos which excluded it from such grant. This being so, any evidence which would have avoided the claim of pre-emption must be clearly a federal question subject to review and determination in this court.

Sherman vs. Buick, 93 U. S., 209.

From these cases it would seem to follow that whatever evidence avoids the claim in this case that the land was of swampy character and that Hayes took title under that grant is a federal question, which should be considered in determining the validity of McCormick's title under the railroad grant from the United States, and the patent thereunder and from the state, which is the equivalent of a patent under that grant. Thus, to avoid the claim of Hayes, it may be shown that the land was not swamp or overflowed in fact within the meaning of the grant of 1850. So it may be shown that the company by its action relinquished its title under the swamp land grant to the railway company, the grantor of Hayes, and that Hayes is not entitled to hold under both grants to the exclusion of McCormick.

The course of conduct of the state in receiving the land under the railroad grant, in certifying it under that grant, of it and the county in never making claim to it under the swamp land grant, and of the county in taxing the land for many years, is certainly the equivalent of a relinquishment of all claim under the swamp land grant, and together with the laches, delay, and acquiescence, estop McCormick in common with his grantees, from claiming the land under such abandoned and relinquished title. These questions, it is submitted, are federal questions inhering directly and immediately in the conflicting claims of title and which should be passed upon and adjudicated here.

II.

LANDS NOT SELECTED CANNOT BE CLAIMED AS SWAMP.

ESTOPPEL AS TO HAYES AND HIS GRANTEES.

In order to perfect the title to lands claimed by it as swamp, the state and county attempted to make selections of such lands. As to this see statutes hereinafter printed; also as to the legislative and judicial history see

Freemont County vs. B. & M. R'y Co., 22 Iowa, 91.
Buena Vista County vs. R'y Co., 112 U. S., 165.

The limitation of the act of March 12, 1860, in regard to making selections was enforced by the land department against the beneficiaries claiming under the swamp land grant.

Buena Vista County vs. R'y Co., 112 U. S., 174.

Linn county, under whom Hayes & McCormick claims, acquiesced in this decision for many years and never, in fact, made new selections, but simply released to Hayes & McCormick all its claim to the land and he attempts to claim the land as swamp without any selection whatever. But the power to make surveys of the public lands belongs to the political department of the government, and that the courts "have no concurrent or original power to make similar corrections, if not an elemental principle of our land law is settled by such a mass of decisions of this court that its mere statement is sufficient. (Citing authorities.)

"The reason of this rule is stated by Justice Catron in the case of Haydel vs. Du Fresne is that great confusion and litigation would ensue if the judicial tribunals, state and federal, were permitted to

interfere and overthrow the public surveys on the ground [illegible] an opinion that they could have the work in the field [illegible] divisions more equitably made than the department of [illegible] could do."

Cragin vs. Powell, 128 U. S., 699.

Where it was claimed that land was wet and swampy in order to defeat a patent from the government, the supreme court of [illegible] said:

"The land is wet and swampy. Defendants insist that it [illegible] to the state for the use of the county under the swamp land [illegible] and that the patent under which plaintiff claims is therefore void. [illegible] is not shown that the land was listed or claimed to be swamp [illegible] by the county, state, or general government. Thus far both [illegible] to the swamp land grant, the state and the United States, have [illegible] in regarding the land in controversy as not being swamp land. The United States has issued a patent to a citizen upon receiving the [illegible] as fixed by law; the state and county have levied and collected [illegible] upon the land, and even sold it for non-payment of taxes; no claim has ever been set up that the land was a part of the swamp land grant. This course of dealing by the state and national government toward the land has continued for more than twenty-eight years."

And accordingly it was held that as to one who did not claim under the swamp land grant, that title could not be set up to defeat the patent.

Davis vs. Nolan, 49 Iowa, 687.

But Hayfield and his grantees are conclusively estopped from claiming under the swamp land grant. And he is in no better situation than a mere trespasser who claims entirely outside of the grant. The supreme court of Iowa has often decided that a county after having taxed lands for a series of years and received the taxes thereon is thereby precluded from claiming title to such lands under the swamp land grant.

Iowa Railroad Land Co. vs. Story County, 36 Iowa, 48.
Adams County vs. B. & M. R'y Co., 39 Iowa, 507.
Audubon County vs. Am. Em. Co., 40 Iowa, 460.
Page County vs. B. & M. R'y Co., 40 Iowa, 520.
Austin vs. Bremer County, 44 Iowa, 155.
Howard County vs. Bullis, 49 Iowa, 521.
Simplot vs. City of Dubuque, 49 Iowa, 631.
Adams County vs. B. & M. R'y Co., 55 Iowa, 101.
Simploy vs. City of Dubuque, 56 Iowa, 639.

"Corporations quite as much as individuals, are held to a care-

ful adherence to truth and uprightness in their dealings with other parties, nor can they be permitted to involve others in onerous obligations by their misrepresentations or concealments without being held to just responsibility for the consequences of their misconduct or bad faith."

County of Calhoun vs. Am. Em. Co., 93 U. S., 130.

That the course of conduct above referred to, together with the delay, acquiescence, and laches in asserting claim of title under the swamp land grant makes a case where the railroad title should be upheld, and the bill to assert the swamp land title should be dismissed see

Godden vs. Kimmel, 99 U. S., 210.
Hayward vs. Bank, 99 U. S., 618.
Sullivan vs. R'y Co., 94 U. S., 811.

As a matter of convenience, that portion of the acts of congress under which plaintiff in error claims title to the land in controversy is hereinafter printed, following the state statutes to which reference must naturally be had in the disposition of this case.

STATUTES OF IOWA.

ACT OF FEBRUARY 5, 1851.

Sec. 1. Be it enacted by the general assembly of the state of Iowa, That the commissioner of the state land office is authorized to take such steps as he thinks necessary, in order to secure to the state, the swamp lands granted by the act of congress of the 28th of September, 1850, entitled "An act to enable the state of Arkansas and other states, to reclaim the swamp lands within their limits."

Sec. 2. For this purpose the commissioner, when he has reason to believe there is any tracts of swamp land within this state not reported as such by the United States surveyor, sufficient to justify a more particular examination, he shall direct the county surveyor of any county, in which said lands may be located, to make the examination, and provide the proofs necessary to secure such lands to the state, a list of which shall be returned to the land commissioner, or the authority acting in that capacity, verified by affidavit, for which services the surveyor is entitled to two dollars per day for each and every day actually employed; and for the purposes of this act, any unorganized county attached to another for election purposes in which an election precinct is organized, is declared to be a part of such organized county.

Sec. 3. Previous to the election and qualification of the com-

missioner of the land office, the duties above prescribed shall devolve upon the governor, whose duty it shall be to procure from the surveyor general's office a list of the lands returned to that office as swamp lands, and take such other steps in the premises as in his opinion are necessary to secure the best interests of this state.

Sec. 4. All compensation for services rendered, or expenses incurred, in carrying out the provisions of this act, must be made out of the proceeds of the sales of the said swamp lands.

Sec. 5. Subject to the approval of the governor, the county surveyor is authorized to contract with individuals or companies for making the levees or drains necessary to reclaim any of the swamp lands of the state, by giving them a portion of the lands thus reclaimed or a portion of the proceeds thereof.

Sec. 6. The commissioner may dispose of any of the swamp lands of the state for such price as he may think them worth, as herein provided; for the purpose of ascertaining said value, the county surveyor and sheriff in any county in which such lands are located, may upon the direction of the commissioner, appraise such lands in such manner as the school lands are now appraised, for which they are to receive a sum not exceeding two dollars per day each, for all the time actually and necessarily expended in making examination and appraisement.

Sec. 7. The proceeds of the sales of such lands, after paying all expenses in selecting appraising, selling and reclaiming such lands as are deemed worthy of reclaiming, shall be paid into the state treasury, subject to the disposition of the general assembly." Revision, 147, 148.

ACT OF JANUARY 13, 1853.

Sec. 1. Be it enacted by the General Assembly of the State of Iowa, That all the swamp and overflowed lands granted to the state of Iowa by the act of congress, entitled an act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits, approved September 28th, 1850, be, and the same are hereby granted to the counties respectively in which the same may lie, or be situated, for the purpose of constructing the necessary levees and drains, to reclaim the same, and the balance of said lands, if any there be after the same are reclaimed as aforesaid, shall be applied to the building of roads and bridges, when necessary, through or across said lands, and if not needed for this purpose, to be expended in building roads and bridges within the county.

Sec. 2. Whenever it shall appear that any of the lands granted to the state by the aforesaid act of congress, shall have been sold by the United States since the passage of that act, it shall be lawful for the said counties to convey said lands to the purchasers thereof.

The deed shall be made by the county court as such, and countersigned by the clerk of said court, with the official seal thereof affixed, and on delivering said deed to the purchaser, the county court shall take from him an assignment of all his rights in the premises, and as such assignee, the said court shall be authorized to receive from the United States the purchase money of said land; and whenever any lands embraced by the said act have been located by bounty land warrants, since the passage thereof, it shall be lawful for such county in which the same are situated, to convey the same, in the manner aforesaid to the person or persons who located said warrant, and take an assignment of the same to the county court, which shall thereupon be considered as grantee of the state, and as such may locate said warrant on any of the public lands belonging to the United States, within the limits of said county.

Sec. 3. In all those counties where the county surveyor has made no examinations and reports of the swamp lands within his county, in compliance with the instructions from the governor, the county court shall at the next regular term thereof, after the taking effect of this act, appoint some competent person, who shall as soon as may be thereafter, after having been duly sworn for that purpose, proceed to examine said lands and make due report, and plats, upon which the topography of the country shall be carefully noted, and the places where drains or levees ought to be made, marked on the said plats, to the county courts respectively, which courts shall transmit to the proper officers lists of all said swamp lands in each of the counties in order to procure the proper recognition of the same, on the part of the United States, which lists, after an acknowledgement of the same by the general government, shall be recorded in a well bound book provided for that purpose, and filed among the records of the county court.

Sec. 4. The said lands shall be under the care and superintendence of the county courts of the counties respectively, in which the same are situated, and at the next April election there shall be elected an officer to be styled drainage commissioner of the county of ———, who shall within twenty days after his election, enter into a bond with good security, to be approved by the county court, payable to the people of the state of Iowa, for the use of the inhabitants of the county of ———, in the penal sum of ten thousand dollars, conditioned for the faithful performance of all the duties required of him, or which may hereafter be required of him by law." Revision 148, 149. (The remainder of the act relates to the sale of lands and deposit of funds realized therefrom.)

ACT OF JANUARY 24, 1853.

Sec. 1. Be it enacted by the General Assembly of the State of Iowa, That, so soon as the examination and survey of the swamp and overflowed lands in any of the counties of this state, shall be completed by the county surveyor (or other person appointed for that purpose,) a full and complete return of the same shall be forwarded to the secretary of state, whose duty it shall be to report the same to the surveyor general.

Sec. 2. And be it further enacted, That all expenses which may have accrued prior to the passage of this act, in any of the counties of this state for the examination and survey of said swamp and overflowed lands, shall be paid in accordance with the provisions of the act to which this is amendatory." Revision 153–4.

ACT OF JANUARY 25, 1855.

Sec. 1. Be it it enacted by the General Assembly of the State of Iowa, That the governor be, and he is hereby authorized and empowered to draw from the treasury of the United States, all moneys which may now be due, or which may hereafter become due to the state of Iowa, arising from any disposition of the swamp lands of this state by the government of the United States; provided, that after said money shall have been transferred to the treasurer of this state, the governor, auditor, and secretary of state, shall constitute a board with power to ascertain what amount of said money is due to any of the counties of this state for swamp lands sold by the government of the United States, since said lands were granted to and became the property of said counties, and said board shall certify to the state treasurer the result of their investigation; and the moneys so ascertained to be due to the counties aforesaid, shall remain in the treasury subject to the draft of the treasurers of said counties.

Sec. 2. That the governor is hereby required to cause said moneys to be deposited in the treasury of this state.

Sec. 3. That the governor is hereby authorized to adopt such measures as to him may seem expedient, to provide for the selection of the swamp lands of this state, and to secure to the state the title to the same, and also for the selection in the name of the state, other lands, in lieu of such swamp lands as may have been or may hereafter be entered with warrants; provided, that the provisions of this act shall not be construed to apply to any swamp lands which have already been selected by any organized county of this state under the provisions of any previous law; and provided further, that this act shall not be construed to impair the rights of the counties of this state to any swamp lands within said counties under the provisions

of any law in force in relation to the same, and that the selections made by the organized counties shall be reported by the governor to the authorities at Washington." Revision 154.

ACT OF JANUARY 27, 1858.

Sec. 1. Be it enacted by the general assembly of the state of Iowa, That the governor is hereby authorized to appoint an agent to proceed to Washington to effect an adjustment and settlement for the different counties in the state, of their swamp land business, and also one or more to have the swamp and overflowed lands selected in the new and unorganized counties of the state; and for defraying the expenses of the same there be, and hereby is appropriated from the treasury of the state, the sum of two thousand dollars.

Sec. 2. That when the general government shall issue the scrip, and refund the money to the state, contemplated by the act of congress of March 2d, 1855, and patent to the state the lands accruing by virtue of the act of congress of September 28th, 1850, the governor, register of state land office, and the agent of the county, if any, shall constitute a board to ascertain what amount of said land, money and scrip, is due the different counties in the state, and when so ascertained the same shall be subject to the order of the county judges, or other proper authorities in the county.

Sec. 3. That the two thousand dollars hereby appropriated be refunded the state with ten per cent interest from date of same, each county paying an amount proportionate to its share of the lands, scrip and money received, to be ascertained and withheld by said board and paid over to the state treasury.

Sec. 4. Any laws inconsistent with, or contrary to this act, are hereby repealed. Revision 159.

ACT OF APRIL 8, 1862.

Sec. 1. Be it enacted by the general assembly of the state of Iowa, That the governor is hereby authorized and empowered to appoint an agent or agents to make a settlement with the commissioners of the general land office, for the lands enuring to the state of Iowa by an act of congress entitled "An act to enable the state of Arkansas and other states to reclaim the swamp and overflowed lands within their limits," approved September 28th, 1850.

Sec. 2. That when the general governent shall have issued the land scrip and refunded the money to this state, as provided in the act of congress approved March 2d, 1855, said land scrip shall be deposited with the register of the state land office, until ordered to be disposed of in accordance with the provisions of this act. And

the money hereafter paid this state as contemplated by [illegible] act of congress, approved March 2d, 1855, shall be [illegible] the state treasurer, subject to the order of the board of [illegible] the county to which said money or land scrip shall belong, as [illegible] inafter provided.

Sec. 3. That as soon as any of the land scrip, referred to in the second section hereof, shall be received by the register of the state land office, he shall immediately notify the governor of such fact; when it shall be the duty of the governor to appoint an agent or agents to receive and locate said scrip, and the appointment of the governor, with the great seal of the state attached, shall be sufficient authority for the register of the state land office to transfer to the person so presenting said appointment, any of the land scrip referred to in this act.

Sec. 4. When the agent contemplated in the third section hereof shall, by virtue of his office, receive any of the land scrip herein referred to, it is hereby made his duty to proceed to the most convenient land office at which said land scrip can be located, and make selections of the number of acres of land named in the scrip he may then have in his possession, and make his return in writing, accompanied with the certificate of the register of the land office where said location may be made, to the register of the state land office. But if there should not be a sufficient number of acres of land subject to be selected by said agent in any one of the government land offices to which said agent may apply, he is authorized to apply to any or all of such offices wherein said scrip can be located, until the scrip in his possession shall be disposed of.

Sec. 5. As soon as any agent contemplated by this act shall deliver his return as provided in this act, to the register of the state land office, it is hereby made the duty of said register to file and record the same according to law, and immediately thereafter send a certified copy thereof to the commissioner of the general land office and demand and receive from said commissioner a patent for the lands thus located, and when such patent shall have been received by said register in his office, he is hereby required to notify the governor of the receipt thereof, when it shall be the duty of the governor to deed the same to the county or counties to which it belongs, and mail the same to the clerk of the board of supervisors of such county.

Sec. 6. Before any agent contemplated by this act will be authorized to enter upon the discharge of the duties herein assigned him, he shall execute a bond to the State of Iowa, in a penal sum to be fixed by the governor and register of the state land office, and with sureties to be approved by them, which approval shall be in writing on the back of said bond, and signed by the governor and register, which said bond after being so approved shall be by them

deposited and recorded in the office of the secretary of state, and shall be for the benefit of any party injured by a breach thereof.

Sec. 7. That the agent or agents appointed by virtue of the provisions of the first section of this act, shall act under and by virtue of written instructions given them by the governor and register of the state land office. But in no case shall said agent be instructed or empowered to receive from the general government any portion of the money due from the government to this state.

Sec. 8. It shall be the duty of the register of the state land office upon the information that the money due this state or any part thereof, can be obtained, to notify the state treasurer, with information to what county it belongs, when it shall be the duty of said treasurer to receive and collect the same.

Sec. 9. The state treasurer shall, as soon as any of said money comes into his hands by virtue of this act, notify the clerk of the board of supervisors of the county to which said money belongs, and upon the receipt of such information by any such clerk in this state, it shall be his duty to communicate such information to the supervisors of his county at their first regular meeting thereafter, and when the board of supervisors of any such county shall by an agent appointed by them, present an order to the state treasurer for the money belonging to their county, certified to by the clerk of said board, with the county seal thereto attached, to the state treasurer, he shall pay over to such agent the money belonging to said county, and their order so presented shall be a sufficient voucher to the treasurer for the payment by him of said money.

Sec. 10. The board of supervisors of any county in this state or the clerk thereof, shall not deliver to any agent appointed by them to receive the money due to any such county, as contemplated in this act, any order or orders to draw such money until such agent or agents shall have executed a bond to such county in a penalty equal to double the amount of money to be drawn by him, with sureties to be approved by said board for the faithful discharge of his said trust.

Sec. 11. That the agents appointed by the board of supervisors by virtue of this act shall receive in full compensation for their services, three dollars per day for the time actually employed by them on said services, said compensation to be paid by the counties receiving said lands or money, and such further sums of money to pay the traveling expenses of said agent while acting in the discharge of his duties as may be agreed upon by and between said agent and the board of supervisors of the county or counties for whose benefit he is acting.

Sec. 12. The agent or agents appointed by the governor under the provisions of this act, shall receive as a full compensation for the services rendered, and expenses incurred by virtue of said ap-

pointment, the sum of four dollars per day, which said compensation shall be paid by the state; but the amount so paid shall be allowed pro rata among the several counties, according to the amount in value of the money and lands secured to such county by the provisions of this act, the land to be valued at $1.25 per acre, and the amount so found due by each county to the state, shall be paid before such county shall receive its share of the money and lands which may be obtained under the provisions of this act.

Sec. 13. Notwithstanding the foregoing provisions of this act, the board of supervisors of any county, for the purpose of expediting a settlement of the claim of such county, may nominate to the governor a suitable person or special agent to settle said claim; and the governor shall thereupon appoint such person the special agent of the state to make such settlement with the United States for the swamp lands within the territorial limits of such county. The proceeds of such settlement may be received by such agent, and shall be delivered to the said board of supervisors for the use of the county. The costs, expenses and compensation of such special agent shall be paid by the county requesting appointment thereof.

Sec. 14. All acts and parts of acts coming in conflict with this act are hereby repealed.

Sec. 15. This act being deemed by the general assembly of immediate importance, shall be in force from and after its publication in the State Register and Des Moines Times, newspapers printed in Des Moines, Iowa. Laws 1862, pp. 186 to 190.

ACT OF APRIL 16, 1870.

An act to tax lands which are owned by counties within the limits of other counties.

Sec. 1. Be it enacted by the general assembly of the state of Iowa, That any and all lands in any county in this state which are owned or held by any other county or counties claiming title under locations with swamp-land-indemnity scrip or otherwise, shall be taxed the same as other real estate within the limits of the county.

Sec. 2. This act shall take effect from and after its publication according to law.

Laws of 1870, p. 233.

STATUTES RELATING TO RAILROAD GRANTS.

ACT OF MARCH 26, 1860.

An act to carry into execution the trust conferred upon the state of Iowa in respect to the lands granted by an act of congress, approved May 15, 1856, to aid in the construction of a railroad from

Lyons City, across the state of Iowa, and near the forty-second parallel to the Missouri river.

Sec. 1. Be it enacted by the general assembly of the state of Iowa, That so much of the lands, interests, rights, powers, and privileges as have been or may be granted and conferred in pursuance of the act of congress, entitled "An act making a grant of lands to the state of Iowa, in alternate sections, to aid in the construction of railroads in said state, approved May 15th, 1856, to aid in the construction of a railroad from Lyons City, north-westerly to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa; thence on said main line running as near as practicable to the forty-second parallel across the state of Iowa to the Missouri river, are hereby disposed of, granted and conferred to and upon the Cedar Rapids and Missouri River Railroad Company, a body corporate, created and existing under the laws of the state of Iowa, Provided, however, that no portion of the grants of land provided for in this act shall be applied to the liquidation of any debt or obligation heretofore made or contracted by the said Cedar Rapids and Missouri River Railroad Company, or of the Chicago, Iowa and Nebraska Railroad Company; Provided, further, that it is hereby declared to be the true intent and meaning of this act, that the state of Iowa according to the conditions herein specified—conveys and grants to the Cedar Rapids and Missouri River Railroad Company, her right, title to and interest in the aforesaid lands, and nothing more; and in no event shall said company have any claim or recourse against the state for any defect in the title or conveyance of said lands."

(Balance of act omitted.)

Laws of 1860, p. 40.

ACT OF MARCH 26, 1880.

"Be it enacted by the general assembly of the state of Iowa:

"Sec. 1. Section 93 of the code of Iowa is hereby repealed and amended so as to read as follows:

"Sec. 93. In cases where lands have been granted to the state of Iowa by act of Congress, and certified lists of lands inuring under the grant, have been made to the state by the commissioner of the general land office, as required by act of Congress, and such lands have been granted, by act of the general assembly, to any person or company, and such person or company shall have complied with and fulfilled the conditions of the grant, the register of the state land office is hereby authorized to prepare, on the application of the

grantee, a list or lists of lands situated in each county inuring to such grantee, from the lists certified by the commissioner of the general land office, as aforesaid, which shall be signed by the governor of the state, and attested by the secretary of state, with the state seal, and then be certified to by the register to be true and correct copies of the lists made to this state, and deliver them to such grantee, who is hereby authorized to have them recorded in the proper county, and when so recorded they shall be notice to all persons the same as deeds now are, and shall be evidence of title in such grantee or his or its assigns, to the lands therein described, under the grant of Congress by which the lands were certified to the state, so far as the certified lists made by the commissioner aforesaid conferred title to the state; but where lands embraced in such lists are not of the character embraced by such acts of Congress or the acts of the general assembly of the state, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and of no force or effect whatever; provided, that no lands now in suit shall be included in such lists until said suits are determined and such lands adjudged to be the property of the company; provided, further, that the register shall not include, in any of the lists so certified to the state which have been adjudicated by the proper courts to belong to any other grant, or adjudicated to belong to any county or individual under the swamp land grant, or any homestead or preemption settlement. Nor shall said certificates so issued confer any right or title as against any person or company having any vested right, either legal or equitable, to any of the lands so certified."

Laws 1880, P. 163-4.

ACTS OF CONGRESS.

RAILROAD GRANT MAY 15, 1856.

Sec. 1. Be it enacted by the senate and house of representatives of the United States of America in congress assembled: That there be and is hereby granted to the state of Iowa, for the purpose of aiding in the construction of railroads from Burlington, on the Mississippi river, to a point on the Missouri river near the mouth of the Platte River; from the city of Davenport, via Iowa City and Fort Des Moines, to Council Bluffs; from Lyons City northwesterly to a point of intersection with the main line of the Iowa Central Air Line Railroad, near Maquoketa, thence on said main line, running as near as practicable to the forty-second parallel across the said state to the Missouri river; from the city of Dubuque to a point on the Missouri river near Sioux City, with a branch from the mouth of the

Tete Des Morts to the nearest point on said road, to be completed as soon as the main road is completed to that point, every alternate section of land, designated by odd numbers, for six sections in width on each side of each of said roads. But in case it shall appear that the United States have, when the lines or routes of said roads are definitely fixed, sold any sections, or any parts thereof, granted as aforesaid, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents to be appointed by the governor of said state, to select, subject to the approval of the secretary to the interior, from the lands of the United States nearest to the tiers of sections above specified, so much land, in alternate sections, or parts of sections, as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption have attached as aforesaid; which lands (thus selected in lieu of those sold and (to) which pre-emption rights have attached, as aforesaid, together with the sections, and parts of sections, designated by odd numbers as aforesaid, and appropriated as aforesaid) shall be held by the state of Iowa for the use and purpose aforesaid; provided, that the land to be so located shall, in no case, be further than fifteen miles from the lines of said roads, and selected for and on account of each of said roads; provided, further, that the lands hereby granted for and on account of said roads severally shall be exclusively applied in the construction of that road for and on account of which such lands are hereby granted, and shall be disposed of only as the work progresses, and the same shall be applied to no other purpose whatsoever; and provided further, that any and all lands heretofore reserved to the United States, by any act of congress, or in any manner by competent authority, for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, be and the same are hereby reserved to the United States from the operation of this act, except so far as it may be found necessary to locate the routes of said railroads through such reserved lands, in which case the right of way only shall be granted, subject to the approval of the president of the United States." (Remainder of act omitted.)

2 Statutes at Large, p. 9.

From amendatory act of June 2, 1864.

"Sec. 4. And be it further enacted, That the Cedar Rapids & Missouri River Railroad Company, a corporation established under the laws of the state of Iowa, and to which the said state granted a portion of the land mentioned in the title to this act, may modify or change the location of the uncompleted portion of its line, as shown by the map thereof now on file in the general land-office of the United States, so as to secure a better and more expeditious line to the Mis-

souri river, and to a connection with the Iowa branch of the Union Pacific railroad; and for the purpose of facilitating the more immediate construction of a line of railroads across the state of Iowa, to connect with the Iowa branch of of the Union Pacific Railroad company aforesaid, the said Cedar Rapids & Missouri River Railroad company is hereby authorized to connect its line by a branch with the line of the Mississippi & Missouri Railroad company; and the said Cedar Rapids & Missouri River Railroad company shall be entitled for such modified line to the same lands, and to the same amount of lands per mile, and for such connecting branch the same amount of land per mile, as originally granted to aid in the construction of its main line, subject to the conditions and forfeitures mentioned in the original grant, and, for the said purpose, right of way through the public lands of the United States is hereby granted to the said company. And it is further provided, that whenever said modified main line shall have been established or such connecting line located, the Cedar Rapids and Missouri River Railroad Company shall file in the general land office of the United States a map definitely showing such modified line, and such connecting branch aforesaid; and the secretary of the interior shall reserve and cause to be certified and conveyed to said company, from time to time, as the work progresses on the main line, out of any public lands now belonging to the United States, not sold, reserved, or otherwise disposed of, or to which a pre-emption right or right of homestead settlement has not been attached, and on which a bona fide settlement and improvement has not been made under color of title derived from the United States or from the state of Iowa, within fifteen miles of the original main line, an amount of land equal to that originally authorized to be granted to aid in the construction of the said road by the act to which this is an amendment. And if the amount of lands per mile granted, or intended to be granted, by the original act to aid in the construction of said railroad shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along said modified line and connecting branch within twenty miles thereof."

13 Statutes at Large, p. 96.

This case is reported. See Hayes vs. McCormick, 83 Iowa 89.

CHAS. A. CLARK,
Attorney for Plaintiff in Error.

Supreme Court of the United States.

OCTOBER TERM, 1894.

ROBERT McCORMICK, *Plaintiff in Error.*
vs.
J. D. HAYES.

No. 57

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR.

By Chas. A. Clark.

Supreme Court of the United States.

OCTOBER TERM, 1894.

ROBERT McCORMICK,
vs. *Plaintiff in Error.* } No. 230.
J. D. HAYES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

BRIEF FOR PLAINTIFF IN ERROR.

By Chas. A. Clark.

STATEMENT.

This suit involves title to forty acres of land situated in Linn county, Iowa. Many other cases pending in the Supreme Court of Iowa and one now pending in this court, depend in whole or in part upon the decision of the questions involved in this suit. The case is, therefore, one of great importance, although the actual value of the land in controversy in this particular suit is small.

The plaintiff in error, defendant in the court below, claims title to the land under the railroad grant to the state of Iowa of May 15, 1856, and the Acts amendatory thereto.

Under this Act the lands in controversy were certified and approved to the state of Iowa Dec. 27, 1858, for the purpose of building a line of railway. (Rec. 14.)

The land having been earned was certified or patented by the state of Iowa to the Cedar Rapids & Missouri River Railway Company, January 17, 1881. (Rec. 15.)

The Cedar Rapids & Missouri River Railway Company conveyed the land to the Iowa Railroad Land Company, March 25, 1870. (Rec. 15.)

And the last named company conveyed the land to the plaintiff in error Octorber 30, 1885. (Rec. 15.)

It was shown that the plaintiff in error and his grantors paid taxes on the land from 1866 to 1888, both years inclusive. (Rec. 16.)

Such is the chain of title and claim of the plaintiff in error.

On the other hand, the defendant in error who was plaintiff below, claims title to the land under the swamp land grant of September 28, 1850, and under the Act of the legislature of Iowa of date February 2, 1853, being Chapter 13 of the Acts of the Fourth General Assembly, and Acts amendatory thereto granting swamp lands received by the state from the United States under said act of congress of 1850, to the various counties of the state wherein said swamp lands were situated. (Rec. 1 and 11.)

It was expressly shown and stipulated that Linn county, prior to 1875, made selections of swamp lands embracing certain tracts in the same section of land in which the forty acres in controversy are situated, and that the particular forty in controversy was not included in any such selections, and had never been patented to the state of Iowa as swamp lands, nor by the state of Iowa to Linn county as swamp lands. (Rec. 17-18.)

Defendant in error, however, held a quit claim deed from Linn county, Iowa, reciting a consideration of one dollar dated September 4, 1888, for which conveyance he paid in fact the sum of fifty dollars. (Rec. 10-11.)

Such was his stale and belated claim of title under which he brought a suit in equity to quiet his title to the land in controversy. The plaintiff here, defendant below, answered, setting up his title as above stated, and also setting up that Hayes and his grantors were estopped from claiming title to the land and that their claim thereto was stale and inequitable. (Rec. 3.)

Both sides introduced parol evidence as to the character of the land, plaintiff in error objecting to all such testimony as incompetent and immaterial, and this objection applied to all of the testimony so introduced tending to show swampy character of the land. (Rec. 4.)

The evidence in support of the alleged swampy character of the land merely tended to show that it was subject to overflow from the Cedar river once or twice a year, but that the greater part of the forty was very sandy and dry land. (Rec. 4-10.)

The evidence in support of the title of plaintiff in error tended to show that the land was all good, dry timber and farming land except a few acres of swampy character. (Rec. 11 to 14.)

The trial court in which the suit was brought decreed the land to be swampy, and that it passed under the swamp land grant, and quieted the title in McCormick. On appeal this decree was affirmed

by the Supreme Court of Iowa. Whereupon this writ of error was sued out.

ASSIGNMENT OF ERRORS.

Plaintiff in error says there is manifest error upon the face of the record in this. The court below erred in holding and deciding:

1. That the title to said land in controversy was in said plaintiff and not in said defendant.

2. That the title to said land passed to the state of Iowa by virtue of said swamp land grant without any designation, listing, certification, or patent by or on the part of the Secretary of the Interior or other officer of the United States.

3. That the plaintiff had and acquired title to the land under the swamp land grant, notwithstanding no selection of the same had ever been made by the state or under its authority or any selection or claim therefor had ever been presented to the Secretary of the Interior.

4. That the district court was authorized to assume jurisdiction to determine that the title of said land passed under the swamp land grant in the absence of any neglect or refusal of the Secretary of the Interior to list or patent the same and in the absence of any application to the Secretary on the part of the state of Iowa to list or patent the same.

5. That parol evidence was admissible and competent to show that the land in controversy was swamp or overflowed land within the meaning of the act of congress of September 28, 1850, at the date of the passage of that act and subsequent thereto.

6. That the certification of said land by the Secretary of the Interior to the state of Iowa under said railroad grant to aid in the construction of the railroad therein mentioned was invalid and void, and that said defendant, McCormick, acquired no title thereto.

7. That the decision of the Secretary of the Interior certifying that the land inured to the state under the railroad grant was not an adjudication that the same did not inure to the state under the swamp land grant.

8. That the evidence shows that the said land was overflowed land within the meaning of the said swamp land act.

9. That said parol evidence as to the swampy character of said land was sufficient to overthrow the title of said defendant thereto.

10. The court below erred in not deciding and decreeing that the defendant in error and his grantors were estopped from asserting the swamp land title and estopped from setting up claim of title against the title and claim of title of plaintiff in error under the railroad grant.

11. The court below erred in not holding that defendant in error was barred by laches of himself and his grantors from assailing

he title of plaintiff in error under the railroad grant, and in not holding that they were so barred under the act of congress of March 12, 1860.

[Note.—The above assignments of error, except Nos. 10 and 11, are annexed to the writ of error herein. (Rec. 25.)]

ARGUMENT.

I.

THE COURTS BELOW WERE WITHOUT JURISDICTION TO ADMINISTER OR ENFORCE THE SWAMP LAND GRANT.

The certification under the railroad grant passed the legal title as against the swamp land grant.

Buena Vista county vs. Ry. Co., 112 U. S., 176.
Frasher vs. O'Connell, 115 U. S., 116.
Mower vs. Fletcher, 116 U. S., 385.

It cannot be doubted that the certification operated to transfer the legal title to the state.

Willliams vs. U. S., 138 U. S., 516.

Certification under the railroad grant passed the legal title so that the holder of the alleged swamp title without a patent could not assail such legal title in an action at law.

French vs. Fyan, 93 U. S., 169.
Buena Vista county vs. Ry. Co., 112 U. S., 176.
Iowa R. R. Land Co. vs. Antoine, 52 Iowa, 429.
Am. Em. Co. vs. Ry. Co., 52 Iowa, 326.

While it has often been held by this court that the swamp land grant of 1850 gave to the respective states a title *in praesenti* it has not been decided that this means the full and absolute legal title, or anything more than an equitable title or interest which may be perfected by identification and certification or patenting of the lands as authorized by the swamp land act itself.

The decisions above cited sustain this view. The second section of the swamp land act provides:

"That it shall be the duty of the Secretary of the Interior as soon as is practicable after the passage of this act to make out accurate lists and plats of the land described as aforesaid and to transmit the same to the governor of the state, and at the request of the governor to cause a patent to be issued to the state therefor, *and on that patent the fee simple title to said lands shall vest in said state* subject to the disposal of the legislature thereof."

This shows that the intention was not to vest the full legal title by the act itself. While the grant was *in praesenti*, yet to become effective the lands were required to be identified the same as under the railroad grants.

It has been many times decided that the railroad grants are also grants *in praesenti*, yet they only take effect from the time when the lands are identified by filing a map of the line of the railway in the office of the Secretary of the Interior.

Grinnell vs. Ry. Co., 103 U. S., 739.
Van Wyck vs. Knevals, 106 U. S., 366.
Kansas Pac. Ry. Co. vs. Dunmeyer, 113 U. S. 634.
U. S. vs. Mo., Kan., etc., Ry., 141, 375.
U. S. vs. So. Pac. Ry. Co., 146 U. S. 570.

Not even staking the line of a railway out upon the surface of the earth is a sufficient identification of locality to make the grant effective, although the grant is *in praesenti*. It must communicate to the government knowledge of its intended line in order to make the grant effective.

Sioux City, etc., Land Co. vs. Griffey, 143 U. S., 39.

Thus, it may happen that a railway grant which is *in praesenti* as much as the swamp land grant, may never take effect at all, for want of a record in the land department which will enable the lands granted to be identified.

The same, it is submitted, is true of the swamp land grant. The legislative history of that grant shows that while it was *in praesenti* it never was intended to vest the full legal title of the lands in the respective states until they were identified and certified or patented.

Thus, shortly after the enactment of the swamp land grant congress passed an act entitling the states which were the beneficiaries of that grant to indemnify in the form of money and scrip for swamp lands which the government after the date of September 28, 1850, had allowed to be entered with money or with land warrants. This obviously was upon the theory that the states had lost the legal title by failing to take timely action under the swamp grant, and the government compensated the states for the loss of their equitable interest in the swamp lands by turning over to them the money which it had received therefor, or scrip for a like amount of lands where swamp lands had been entered with warrants or scrip.

See Act of March 2, 1855, 10 U. S. Stats. at Large, p. 634.

Again, by the act of congress approved March 12, 1860, it was provided that the swamp land selections in all of the states

"Shall be made within two years of the adjournment of the legislature of each state, at its next session after this act, and as to all lands hereafter to be surveyed within two years from the adjourn-

ment of the next session after notice by the secretary to the governor of the state that the surveys had been completed and confirmed."

This was a limitation fixed by congress after which all equitable claims to swamp land titles would be forfeited unless submitted to the appointed tribunal as required by the terms of the original act.

Not only was this inconsistent with the notion that a full legal title had passed, but it was an additional legislative enactment requiring the grant to be administered by the land department in the first instance. It is shown that in the case at bar Linn county had made its selections under the swamp land grant including lands in the very section in which the forty in controversy is situated and had made no selection or claim to this particular forty. By this selection it was estopped from asserting title to the land in controversy after it had passed under the railway grant and had been taxed for many years.

Chandler vs. Calumet Mining Co., 149 U. S., 79.
State vs. Flint, etc., Ry. Co., (Mich.) 51 N. W. Rep., 104.
Crapo vs. Township of Troy, (Mich.) 57 N. W. Rep., 806.

And where under a similar grant *in praesenti* the beneficiary neglected to take the necessary steps to identify the land this court said:

"If the plaintiff has been injured, it is by his own laches. If there was no line to specify its demand it is because it delayed over three years to file its map to establish the line of its road, and for years afterwards to make selections. It is unreasonable to say that during all that time these valuable lands were to be kept out of the market when the country was rapidly filling up with an agricultural population, settling and making valuable farms on them."

Ry. Co. vs. Hering 110 U. S., 41.

Under such circumstances, and with the swamp land title abandoned and an estoppel against asserting it, have the courts jurisdiction to step in and attempt to administer the swamp land grant, identify the lands and settle the title, when not only has no appeal whatever been made to the land department to do this, but when the record shows an express failure to appeal to the proper tribunal invested by congress with the duty of administering the grant, and even more than than this, an express renunciation and abandonment under the grant? We submit that the courts under such circumstances are wholly without jurisdiction to attempt to enforce the swamp land grant.

This court long ago held, in an opinion by Mr. Justice Miller, that the second section of the swamp land quoted above:

"Devolved upon the secretary as the head of the department which administered the affairs of the public lands, the duty, and con-

ferred on him the power of determining what lands were of the description granted by that act, and made his office the tribunal whose decision on that subject was to be controlling."

French vs. Fyan, 93 U. S. 171.

It has been decided that where the secretary neglects or refuses to do his duty and would issue no patents, although many years had elapsed since the passage of the act, congress under such circumstances may enforce, and aid in the administration of the grant.

Ry. Co. vs. Smith, 9 Wall 95.

But courts of equity have no power to determine the title to public lands under a public statute or grant while the same remain subject to the administrative control of the land department. Courts are not permitted to "render a decree in advance of the action of the governme,it which would render its patents a nullity when issued."

Marquez vs. Frisbee, 101 U. S. 475.

"The appropriate officers of the land department have been constituted the special tribunal to decide such questions and their decisions are final to the same extent that those of other judicial or quasi tribunals are."

Vance vs. Burbank, 101 U. S. 509.

"In French vs. Fyan, 93 U. S. 169, this court decided that by the second section of the swamp land act the power and duty devolved upon the Secretary of the Interior as the head of the department which administered the affairs of the public lands of determining what lands were of the description granted by that act and made his office the tribunal whose decision on that subject was to be controlling. And he was to transmit the list of such lands to the governor of the state, and at the latter's request issue the patent therefor to the state."

Erhardt vs. Hogaboom, 115 U. S. 68.

"If the officer whose duty it is to hear and determine it refuses without just reason so to do, the proper remedy is by writ of mandamus and not by bill in equity."

Craig vs. Leitensdorfer, 123 U. S. 213.

Where a statute of the United States required all titles from the Mexican government in California to be submitted to a special tribunal, no matter whether such titles were valid and perfect or inchoate and imperfect, this court held that a perfectly valid and good title was lost by failure to submit to the special tribunal, and that the courts could not reinstate the owner of such title in his rights.

Botiller vs. Dominguez, 130 U. S. 202.
See also Baldwin vs. Stark, 107 U. S. 465.

To substitute courts "for the tribunal which congress has provided to determine the question would be making a patent of the United States a cheap and unstable reliance as title for lands which it purported to convey."

French vs. Fyan, 93 U. S. 169.
Erhardt vs. Hogaboom, 115 U. S. 69.

It is only where the secretary has "neglected or failed to make the identification that it is competent for the grantees of the state to prevent their rights from being defeated, to identify lands in any other appropriate mode which will effect that object."

Wright vs. Roseberry, 121 U. S. 509.

And in a still later case it was held by this court that such action of the courts in administering the swamp land grant was "limited in its operation to cases in which there had been non-action or refusal to act on the part of the Secretary of the Interior in selecting lands."

Chandler vs. Calumet Co., 149 U. S. 86.

And in the same case it was further expressly held and determined that where land in the same township was identified and certified by the secretary as swamp land, but the land in controversy was not included in such certification, and was on the contrary identified and certified under a different grant, this amounted to an adjudication that such land was not swamp land, but was in fact land of the character which passed under the conflicting grant, and that parol evidence could not be received to overturn a certification under such conflicting grant which "operated to pass the title as completely as could have been done by formal patent."

Chandler vs. Calumet Co., 149 U. S. 92.

And to same effect see Crapo vs. Township of Troy (Mich.) 57 N. W. Rep. 806.

And that a complete estoppel is thus established which will prevent the courts from attempting to administer the swamp land grant *de novo* see

State vs. Flint, etc., Ry. Co., (Mich.) 51 N. W. Rep., 104.

It is true that some of these decisions were in actions at law. But within the principles which they establish, a court of equity can no more interfere with the administration of a public land grant and take it out of the hands of the designated tribunal than a court of

law can do so, without some definite and tangible grounds authorizing and requiring such interference in order to effectuate justice and prevent a failure of the grant. No such grounds for interference are shown in the case at bar.

II.

PROOF NOT SUFFICIENT TO ESTABLISH SWAMPY CHARACTER OF THE LAND

The rule as established by this court is that where land has been patented or certified under another grant that title will not be disturbed unless the court is clearly satisfied by full proof that the lands are swamp or overflowed lands.

Buena Vista county vs. Ry. Co., 112 U. S., 176.

The land must be clearly swampy. This must be shown by testimony producing the fullest conviction.

Ry. Co. vs. Smith, 9 Wall, 99-100.
French vs. Fyan, 95 U. S. 173.

"Courts of equity will only interfere in any case where it is clear that fraud is shown or that the officers of the land department have by a mistake of law given to one man the land which on the undisputed facts belonged to another."

Moore vs. Robins, 96 U. S. 535.
Marquez vs. Frisbee, 101 U. S. 476.
Shepley vs. Cowan, 91 U. S. 330.
Baldwin vs. Stark, 107 U. S. 467.

"To annul a patent and destroy a title claimed under it the facts on which such action is founded must be clearly established by evidence entirely satisfactory to the court, and the case itself must be within the class of causes for which such an instrument may be avoided."

Maxwell Land Grant Case, 121 U. S., 379.
U. S. vs. Throckmorton, 98 U. S., 61.
U. S. vs. San Jacinto Tin Co., 125 U. S., 300.
U. S. vs. Silver Mining Co., 128 U. S., 677.

The evidence relied on to show swampy character merely tended to establish occasional overflow of the land in controversy from the Cedar River. Record 4 to 11. Under an express decision of this court such evidence is insufficient to make out the claim.

"No lands should be considered as embraced within the terms 'swamp and overflowed' by mere implication. * * * The term overflowed as thus used has reference to the permanent condition of

the lands to which it is applied. It has reference to those lands which are overflowed and will remain so, without reclamation or drainage. * * * It was never intended that all the public lands which perchance might be temporarily overflowed at the time of freshets and high water, but for the greater portion of the year were dry lands should be granted to the several states as swamp and over flowed lands."

Heath vs. Wallace, 138 U. S., 580, 584.
See also San Francisco vs. LeRoy, 138 U. S., 670.

III.

SELECTION OR CLAIM OF SWAMP LANDS MADE FOR FIRST TIME AFTER 1875 WAS VOID.

The act of congress of March 12, 1860, already referred to, prohibited new swamp selections or claims after a certain date. That act provided:

SECTION 1. "That the provisions of the act of congress entitled 'An act to enable the state of Arkansas and other states to reclaim the swamp lands within their limits,' approved September twenty-eight, 1850, be and the same are hereby extended to the states of Minnesota and Oregon: *Provided*, That the grant hereby made shall not include any lands which the government of the United States may have reserved, sold, or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authority of said act.

"SEC. 2. That the selections to be made from the lands already surveyed *in each of the states*, including Minnesota and Oregon, under the authority of the act aforesaid, and of the act to aid the state of Louisiana in draining the swamp lands therein, approved March second, one thousand, eight hundred and forty-nine, shall be made within two years from the adjournment of the legislature of each state at its next session after the date of this act; and as to all lands hereafter to be surveyed, within two years from such adjournment, at the next session, after notice by the Secretary of the Interior to the governor of the state that the surveys have been completed and confirmed."

The title of this act is "An Act to extend the Provisions of 'An Act to enable the State of Arkansas and other states to reclaim the Swamp Lands within their Limits,' to Minnesota and Oregon, *and for other purposes*."

12 U. S., Stats. at Large, p. 3.

The lands in Linn county, Iowa, including the forty in controversy, were surveyed prior to Dec. 27, 1858, because the tract in con-

troversy and others were then certified to the [illegible] grant, (Rec. 14), and they could not have been [illegible] surveyed.

The Constitution of Iowa, Sec. 2 of Art. 2, provides for [illegible] sessions of the legislature, commencing second Monday of [illegible] after the election of members, and Sec. 9 of Art. 13, provides that [illegible] first regular session should be held in the year 1858, commencing on the second Monday of January of that year.

The next regular session after the passage of the act of congress of March 12, 1860, was therefore held in 1862, and that session [illegible] adjourned April 9, 1862, of which the court below was required to take judicial notice, and of which this court, in its turn, will take judicial notice.

The time for making swamp land selections in Linn county therefore expired April 9, 1864.

After that such selections were prohibited. The land department had no authority to administer the grant as to selections made after that date, and the courts could not step in and administer the grant *ab initio* where the department was prohibited from acting, and the seletion or claim prohibited and void.

It is stipulated that the land in controversy was not included in the selections made prior to 1875, although other lands in the same section were selected; and it is further stipulated that this tract was never patented nor certified under the swamp land grant (Rec. 15). There is no pretense that there was ever any selection of this tract. There never was any semblance *claim*, until it was released to Hayes for a nominal consideration September 4, 1888. (Rec. 10, 11.)

The whole claim was then void and prohibited under the very terms of the legislation governing the swamp land grant. The court below was bound to take judicial notice of this legislation, and should have enforced it and rejected the claim.

The swamp land grant is not to be broadened by conjecture or surmise, nor by a loose interpretation of the statutes. As to this very grant, the familiar rule has been applied by this court, "those who claim against the government under legislative grants must show a clear title."

Rice vs. S. C. & St. P. R. R. Co., 110 U. S. 698.

Here, instead of a clear title, one prohibited by law is shown, and the courts cannot enforce it.

This branch of the case is covered by the 1st, 2d, 3d, 4th, 5th and 11th assignments of error.

As Hayes showed no title to the land, it was not open to him to contest the title under the railroad grant. "It was a matter of no moment to him what became of the title."

"The government, the owner of the land, was satisfied and pat-

ented the land" under the railroad grant. "Into the *bona fides* of this transaction no one but the government can inquire," in the absence of one holding a prior equity or title.

Sioux City, etc., Land Co. vs. Griffey, 143 U. S., 41.

Hayes not only did not have a prior equity, or better title, but he had no equity or title whatever. Hence it is submitted that the decree below should be reversed

CHAS. A. CLARK,
For Plaintiff in Error

MAR 26 1895
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 37

ROBERT McCORMICK, PLAINTIFF IN ERROR,

vs.

J. D. HAYES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

ARGUMENT AND BRIEF OF DEFENDANT IN ERROR.

(14,745.)

Voris

Supreme Court of the United States

OCTOBER TERM, 1894.

No. 230.

ROBERT McCORMICK, PLAINTIFF IN ERROR,

vs.

J. D. HAYES.

IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

ARGUMENT AND BRIEF OF DEFENDANT IN ERROR.

This action is in this court only because the construction of certain statutes of the United States is involved in the matter in dispute. As counsel for the defendant in error understand the practice in proceedings of this kind, this court does not exercise

or have any appellate powers, and does not pass upon the facts that may have been in dispute in the state courts, but wholly upon the law applicable to the facts as found by the state courts. In other words it is claimed by the plaintiff in error, that upon all of the facts as found, proven and established by and in the state courts, the statutes of the United States will not warrant the relief that was granted upon those facts by the state courts.

It will be seen at once upon reading the record in this case, that the question involved in it, is one growing out of conflicting land grants by the congress of the United States. The claim of the plaintiff in error to the lands in controversy, is under the land grant by congress to certain Iowa railroads, of date May 15th, 1856, and acts amendatory thereto. That of the defendant in error is made under the grant known as the swamp land grant, by congress, of date September 28th, 1850, and acts amendatory thereto. The chain of title of each of the parties, is perfect under the said grant under which he claims title to the lands. The single question is then presented as to which of the two is the legal one, and passes the title to the lands.

The first position taken and contended for by the defendant in error is, that the effect of the grant known as the swamp land grant, and under which the defendant in error claims title to the lands involved in this action, was at once upon the passage of the act, to pass the title to all the lands intended to be conveyed and covered by the grant, to the state wherein the lands might be. That it was a grant *in presenti* and consequently divested the general government of all title thereto, and placed it at once in the state, and all that was required thereafter to do was to in some way identify the lands. If as a matter of fact the the effect of the act in question, was to at once pass the title to all of the lands covered by the grant to the several states, and to divest the general government of title thereto, then it is contended by the defendant in error that there was no title that did or could pass to the railroad company, or to the State of Iowa in trust for the railroad company, under the land grant of date May 15th, 1856, and June 2nd, 1864.

First.

At this late day there can be no question, it seems to counsel for defendant in error, as to the effect of the smamp land grant in passing title to the lands covered by the grant. That question has been passed upon so frequently by nearly every state court in the land, and by this court as well, and there is one unbroken line of authorities to the effect that the title to all of the lands covered and intended to be covered by the grant, passed at once to the state wherein the lands were located. The following are some of the cases wherein the courts so hold:

B. & M. R. R. Co. vs. Fremont county, Iowa; 9th Wall, page 95.
Wright vs. Roseberry; 121 U. S., page 488.
Allison vs. Halfacre; 11th Iowa, page 450.
Barrett vs. Brooks; 21st Iowa, page 144.
C. R. I. & P. R. R. Co. vs. 40th Iowa, page 333.
Sacramento Valley Reclamation Co. vs. Cook; 61st Cal., page 341.
French vs. Fyan; 93 U. S., page 93.
Railroad Co. vs. Smith; 9th Wall, page 95.
Martin vs. Marks; 97th U. S., page 345.
Owens vs. Jackson; 9th Cal., page 322.
Summers vs. Dickenson; 9th Cal., page 554.
Clarkson vs. Buchanan; 53d Mo., page 563.
Gaston vs. Scott; 5th Oregon, page 48.
Supervisors vs. State's Attorney; 31st Ill., page 68.

Second.

But it is claimed by the counsel for plaintiff in error, that because the land in question was not certified or listed by the Secretary of the Interior to the State of Iowa, and had never been patented to the state under the swamp land grant, that the state acquired no title to the same, and consequently the defendant in error has none as grantee of the county. In other words it is claimed that because the lands had not been so certified and patented under the grant, that the character of the land

could not be enquired into nor established by parol testimony and consequently, if the same was in fact of the character described and intended to be conveyed by the grant, the state and the county must lose the same because the officers of the Interior Department, or of the state, failed to make the selection of this land and procure a patent therefor under the grant.

It is admitted in the record that no patent to these lands had been issued to the state, but we contend that under the grant, and under the decisions of this court, that was not at all necessary to the passing of the title to the lands to the state, and from the state to Linn county, for the passing of the title did not depend upon the patent and listing of the lands, for if they are of the character of the lands intended to be covered and conveyed by the act of congress, the *act* passed the title at the date of its passage.

The question as to right to establish the character of the lands claimed to have been swamp lands within the intent and meaning of the act of congress, by parol testimony, or any other competent testimony by which any fact can be established, has been before, and passed upon by this court, and this court has decided that it is competent to establish the character of the land in that way, where the same has never been selected and patented, or otherwise identified as such.

In the case of the Hannibal & St. Joseph Railroad Company vs. Lewis Smith, reported in the 9th Wall, page 95, this very question was squarely before this court, and in a case where lands claimed to be of the character of that conveyed by the swamp land grant, had never been listed or patented under the grant.

In that case the court makes use of the following terse language: "No act of congress has ever attempted to take back this grant of the swamp lands, or to forfeit it, or to give it to any other grantee, or modified the discription by which they were given to the states. It was protected by positive reservation in the grant under which the plaintiff claims, (the R. R. grant).

Now when a party claiming under that grant sues to recover a particular piece of land which is excepted out of the grant by appropriate language, is it not competent to show by parol proof that it was of the class covered by the first grant and excepted from the second, namely, so swampy, overflowed, and wet, as that a major part of the tract was unfit for cultivation? By the 2d section of the act of 1850, it was the duty of the Secretary of the Interior to ascertain this fact, and furnish the state with the evidence of it. Must the state lose the land, though clearly swamp land, because that officer has neglected to do this? The right of the state did not depend on his action, but on the act of congress and though the state might be embarrassed in the assertion of this right by the delay or failure of the secretary to ascertain and make out lists of these lands, the right of the states to them could not be defeated by that delay. As that officer had no satisfactory evidence under his control to enable him to make out these lists, as is abundantly shown by the correspondence of the land department, with the state officers, he must if he had attempted it, rely as he did, in many cases on witnesses whose personal knowledge enabled them to report as to the character of the tracts claimed to be swamp and overflowed. Why should not the same kind of testimony, subjected to cross examination, be competent, when the issue is made in a court of justice, to show that they are swamp and overflowed, and so excluded from the grant under which plaintiff claims, a grant which was also a gratuity? The matter to be shown is one of observation and examination, and whether arising before the secretary, whose duty it was primarily to decide it, or before the court, whose duty it became because the secretary had failed to do it, this was clearly the best evidence to be had, and was sufficient for the purpose."

On the same point, this court in the case of Wright vs. Roseberry, reported in 121st U. S., on page 509 of the opinion says: "But when that officer (the Secretary of the Interior) has neglected or failed to make the identification, it is competent for the grantees of the state, to prevent their rights from being

defeated, to identify the lands in any other appropriate mode which will effect that object."

Third.

All of the swamp and overflowed lands that were granted to the several states by the Act of Congress of date Sept. 28th, 1850, were by the Fourth General Assembly of the State of Iowa, and chapter 12 of the Acts of the Fourth General Assembly passed February 2, 1853, conveyed by the State of Iowa to the several counties of the state wherein the lands were located. Section one of said chapter 12 being as follows, to-wit:

"Section 1: Be it enacted by the General Assembly of the State of Iowa, that all of the swamp and overflowed lands granted to the State of Iowa by the act of congress entitled an act to enable the State of Arkansas and other states to reclaim the swamp lands within their limits, approved Sept. 28th, 1850, be, and the same are hereby granted to the counties respectively in which the same may lie, or be situated, for the purpose of constructing the necessary levies and drains, to reclaim the same—and the balance of said lands, if any there be after the same are reclaimed as aforesaid, shall be applied to the building of roads," &c.

The defendant in error is the grantee from Linn county of the premises in controversy. See page 10 of transcript of record.

Fourth.

In the 6th assignment of error the plaintiff in error charges the State Court committed manifest error in holding that the certification of the lands in controversy by the Secretary of the Interior to the State of Iowa under the railroad land grant, for the purposes of the grant was void, and passed no title.

This claim is based upon the fact that notwithstanding the character of the lands, as to their being in fact swampy and overflowed lands, the fact that the Secretary of the Interior certified

the lands to the state under the railroad land grant of 1856, before the lands had been certified and patented to the state under the swamp land grant of 1850, the title of the plaintiff is perfect under the certificate.

The question as to the effect of a certification of lands under such a grant as the railroad land grant, after conveying the lands so certified, under another and prior grant, has been before this court before.

In the case of Wright vs. Roseberry reported in the 121st U. S., page 488, this identical question was before the court. The plaintiff in that case claimed the lands as grantee from the state under the swamp land grant, although the lands had not been certified, listed or patented to the state under the grant, and the defendant claimed the same lands under patents, issued under the preemption laws, issued *after* the 28th day of Sept., 1850. It was there claimed that the patents so issued were conclusive, and could not be impeached or even questioned. In that case also as in the case at bar the swampy character of the lands was established by parol proof, and the proof established the same facts as to its character as it did in this case, but the lower court held that the patent concluded any inquiry as to the character of the lands, and became a verity. In that case this court holds that the title of the state to the swamp lands granted to it under the act of date Sept. 28th, 1850, accrued from the date of the act, and a title derived from the state took precedence over a grant by the United States subsequent to that time. And in that opinion, the court cited with approval a large number of cases holding the same doctrine. See—

Ringo's Executor vs. Rotan Heirs; 29th Ark., page 56.
Owens vs. Jackson; 9th Cal., page 322.
Summers vs. Dickinson; 9th Cal., page 554.
Kernan vs. Griffith; 27th Cal., page 87.
Sacramento Valley Reclamation Co. vs. Cook; 61st Cal., page 341.
Smelting Co. vs. Kemp; 104 U. S., page 636.

In this last mentioned case, the question is very fully and ably discussed by the court, with the conclusion arrived at and announced, that "patents of the United States for lands which they had previously granted, reserved for sale, or appropriated, are void. And in such case, the validity of the grant is necessarily examinable at law." Among other things, the court says: "It would be a most extraordinary doctrine if the holder of a conveyance of land from a state were precluded from establishing his title simply because the United States may have subsequently conveyed the lands to another, and especially from showing that years before, they had granted the property to the state, and thus were without title at the time of their subsequent conveyance."

In the case of New Orleans vs. United States, 10th Pet., page 731, of the opinion, this court says: "It would be a dangerous doctrine to consider the issuing of a grant as conclusive evidence of right in the power which issued it. On its face it is conclusive, and cannot be controverted; but if the thing granted was not in the grantor, no right passes to the grantee. A grant has been frequently issued by the United States for land which had been previously granted, and the second grant has been held to be inoperative."

See on the same point and to the same effect:

Easton vs. Salsberry; 21st Howard, page 426.
Reichart vs. Felps; 6th Wall, page 160.
Best vs. Polk; 18th Wall, page 112.

It occurs to counsel for defendant in error, that there can be no question as to absolute invalidity of the certification of the lands in controversy to the state, under the railroad land grants of 1856, and acts amendatory thereto, if the lands are in fact swamp or overflowed, and were such at the date of the passage of the act, Sept. 28th, 1850, in view of the fact, that the grant of 1850 passed the absolute title to the lands to the State of Iowa as of that very date. For in that case the United States had no title or right to the lands, and no right to certify the lands, at

the time the same were certified by the Secretary of the Interior to the State of Iowa, under the land grant act of 1856. If not, then under the decisions of this and other courts, the certificates were void, and passed no title or right to the lands, and the grantees of the state under that certification, derive no title. And that being so, the plaintiff in error has no right to attempt to impeach the title of the defendant in error, or question the same in any manner, as he is a mere intermeddler without right or authority of any kind.

Fifth.

Assuming that the land in question was and is swamp and overflow lands under the swamp land grant of 1850. and that the title thereto passed at once to the state of Iowa, let us then see what the claim of title of the plaintiff in error is based upon, and what right he has to question the title of the defendant.

The very act under which the plaintiff in error claims title to the land in dispute, provides that, it conveyed and granted lands to the State of Iowa, in trust, the title to which was then in the United States and which had not *heretofore* been conveyed. See U. S. Statutes at large Vol. 11, page 9. One of the grants by this Act was to the Iowa Central Air Line Road near Maquoketa, running thence west as near as practicable to the 42d parallel across the state to the Missouri River. By act of the State of Iowa, passed on the 14th day of July, 1856, the State of Iowa accepted the lands thus granted by the Act of Congress, and granted the lands to the four roads crossing the state, one of them being the said Air Line Railroad. Afterwards on account of the failure of the Air Line Co. to build the road as provided for in the grant by the state to it the grant was revoked and the lands so granted were granted to Missouri River Railroad Company by Act of the legislature of the State of Iowa passed on the 17th day of March, 1860. The said last mentioned road to be built along the same line as was the Air Line Railroad, and subject to the same conditions in all respects. There being no dispute between the parties to this action as to these facts, the

Acts referred to are not quoted. The plaintiff in error is the grantee of the grantee of the Missouri River Railroad Co.

The Act of May 15th, 1856, provides that the railroad company shall be entitled to each alternate section on each side of the road, for a distance of six miles in width, and in case of preemptions, etc., so there shall not remain available the full amount of land equal to the alternate sections granted within the six mile limit, then the company should have the right to select sufficient unoccupied lands to make up the deficiency, outside of the six mile limit from the line of the road, but in the language of the Act: "Provided, That the land to be so located shall in no case be further than fifteen miles from the lines of the said roads, and selected for and on account of each of said roads." This court will observe that it is conceded and stipulated in the record of this case, that this land in controversy lies seventeen miles to the closest point in a direct line to the Missouri River Railroad, now the C. & N. W. Ry., and that this road was built to a point about one hundred miles west of Cedar Rapids, Iowa, on and prior to the 2d day of June, 1864. See Transcript of the Record, page 10.

June the 2d, 1864, and after the Missouri Railroad had been built along the line selected and designated, for a distance of one hundred miles west of Cedar Rapids and the land in controversy, congress passed an Act authorizing the Missouri River Railroad Co. to change or "modify" its line from said point to where the terminus of the road then was, to the Missouri River, and in addition to the lands designated from which the selections could be made in quantity equal to each alternate section for a distance of six miles on each side of the road, this Act of June 2 further provided that in case there was not sufficient lands within the six and fifteen mile limits, as provided by the original Act, to make the necessary amount of lands granted, then the balance could be selected within a distance of twenty miles of the line, but that the selections so made must be along the "modified line" only. As counsel construe the Act of June 2, 1864, the selections to be made within the twenty mile limit could not be made along the

main line of the road that had already been constructed, but only along the "modified line" and the Act defined what that "modified line" should be, namely from the point then completed to the Missouri River, and the Onawa connection.

If the construction that counsel places upon the Act of date June 2d, 1864, is the correct one, then under no circumstances could the Secretary of the Interior confer any title to the lands, under the Act by which he attempted to certify them to the state because it is conceded that the lands in question lie beyond the six and fifteen mile limits fixed by the original Act making the grant. By the stipulation it is agreed that the eastern terminus of the "modified line" of the Missouri River Railroad, was at a point one hundred miles west of the land in question.

The exact wording of the Act of June 2d, 1864, as to where the lands outside of the fifteen mile limit could be selected is as follows: "And if the amount of land per mile granted, or intended to be granted by the original Act, to aid in the construction of said railroad, shall not be found within the limits of the fifteen miles therein prescribed, then such selections may be made along "said modified line and connecting branch within twenty miles thereof."

The same Act defines definitely what shall be the "modified line and connecting branch." See the Act itself. And see also case of Cedar Rapids & Missouri River Ry. Co. vs. Herring, 110 U. S., page 27, in which case this court has determined the question as to the effect of the Act of June 2, 1864, on the point here discussed. That right under any circumstances to select lands beyond the fifteen mile limit, other than along the said "modified line" was put in issue in this case, and the stipulation as to the location of the lands a distance of seventeen miles from the road in a direct line, was entered into to establish the unauthorized certification of the land to the state by the Secretary of the Interior, under the grant of date May 15, 1856, in trust for the Air Line road, or its grantees.

This land involved in this action was never patented, or

passed to the State of Iowa, in any other way than by the swamp land grant of 1850, or the certification by the Secretary of the Interior under the railroad land grant of 1856, so that if the said certification was void because the government had parted with the absolute title to the lands by the swamp land grant, the plaintiff in error has not the shadow of right to the land, and being a mere meddler, cannot bring in question the title of the defendant in error.

The land in controversy was certified to the grantor of the plaintiff in error, on the 17th day of January, 1881, by the governor of the State of Iowa, and the register of the state land office, under the provisions of chapter 167 of the Acts of the 18th General Assembly of Iowa, and title thereto is claimed by the plaintiff in error from that source and none other, and it is expressly provided in that Act as follows:

"Section 93 (as amended): In cases where lands have been granted to the State of Iowa by Act of Congress, and certified lists of lands inuring under the grant, have been made to the state by the Commissioner of the General Land Office, as required by Act of Congress, and such lands have been granted, by Act of the general assembly, to any person or company, and such person or company shall have complied with and fulfilled the conditions of the grant, the register of the state land office is hereby authorized to prepare, on the application of the grantee, a list or lists of lands situated in each county inuring to such grantee, from the lists certified by the commissioner of the general land office, as aforesaid, which shall be signed by the governor of the state, and attested by the secretary of state, with the state seal, and then be certified to by the register to be true and correct copies of the lists made to the state, and deliver them to such grantee, who is hereby authorized to have them recorded in the proper county, and when so recorded they shall be notice to all persons the same as deeds now are, and shall be evidence of title in such grantee or his or its assigns, to the land therein described, under the grant of congress by which the lands were certified to the state, so far as the lists made by the Com-

missioner aforesaid conferred title to the state; but where lands embraced in such lists are not of the character embraced by such Acts of Congress or the Acts of the general assembly of the state, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and of no force or effect whatever."

So all that the state at any time ever attempted to convey to the grantor of the plaintiff was the right and title that the state might have to the lands so certified, and if by any grant or Act of Congress the lands certified had been conveyed away by the general government, then it was intended that no title should pass from the state to the grantee of the state. In other words, the certificate from the state was but a simple quit claim to the grantee of any interest that the state might have under the provisions of the grant of date May 15th, 1856, and the plaintiff in error could receive no greater right than his grantor had. So that if the title was not in the general government at the time that the Secretary of the Interior undertook to certify this land to the state under the railroad land grant, because of the former conveyance under the swamp land grant, or if the land was beyond the limit in distance from the line of the road as fixed by the Act of Congress, under and by virtue of which the Secretary of the Interior undertook to certify the lands to the state as he did, then the plaintiff in error is wholly without title or right of any kind to this land, and being so he has no right to question the manner of proof by which the defendant in error establishes his title to the land.

Counsel believes that he has called the attention of this court to the facts and law bearing upon this controversy and is content to submit the whole matter to the court, believing that this court will be at a loss to discover any error which it has authority to consider, and that the opinion of the state court will be allowed to stand.

D. E. VORIS,
Attorney for Defendant in Error.

Supreme Court of [illegible]

NUMBER [illegible]

APR 4 1898
JAMES H. McKENNEY, Clerk

ROBERT McCORMICK, PLAINTIFF IN ERROR,
vs
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IN ERROR TO THE SUPREME COURT OF THE STATE OF IOWA.

A list of authorities cited and commented upon by counsel for the defendant in error, in addition to those cited in printed brief, which list is hereby printed for examination of the court, upon the suggestion of His Honor Chief Justice Fuller upon the hearing of the cause before this court.

NUMBER 14,745.

D. E. VORIS, ATT'Y FOR DEFENDANT IN ERROR.

On the Proposition, that if the land in controversy was in fact swamp land, and of the character contemplated by the Act of Congress, on the date of the act, that a subsequent relinquishment, or abandonment of the lands by the state or county, would not enure to the railroad company, and that the railroad company never had any reversionary interest in the lands, if swamp in fact, and that the title was never in the railroad company, but was expressly excluded in the railroad land grant of 1856. See the following authorities cited.

Kansas Pacific Railway Company vs Dunmeyer 113th U. S., Page 629, and especially pages 639, 640, and 641.

Walden vs Knevals, 114th U. S. page 373.

Leavenworth & Ry Company vs the United States, 92d U. S. 634,

Burlington and Missouri River Ry Company vs Fremont County, 9th Wall page 89.

Hannibal & St. Joe Ry. Company vs Smith, 9th Wall page 95.

On the proposition urged that the land in controversy is and was swamp land within the meaning of the act of Sept. 28th, 1850, see Lester's Land Laws, Vol. I, page 543.

Decisions of the Department of the Interior, Vol. 9, page 124, (relating to Public Lands.)

Keeran vs Griffith 31 California, page 466.

Thompson vs Thornton, 50 Cal., page 145 of opinion.

American Emigrant Co. vs Rogers Locomotive Co., 83d Iowa, page 612.

On the proposition that the taxing of the land is not an estopple on the part of the county in claiming the lands as swamp land, as construed by the Supreme Court of the state of Iowa, see

County of Buena Vista vs Iowa Falls and Sioux City Ry. Co., 46th Iowa Page 228 of opinion.

Bixby vs Adams Co., 49th Iowa, page 513 of opinion.

Bailey vs Calahan, 87th Iowa page 108.